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No. 97-

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1997

KAWERAK REINDEER HERDERS ASSOCIATION,

Petitioner,

v.

THOMAS E. WILLIAMS, ALASKA REINDEER HERDERS, INC., and REINDEER HERDERS ASSOCIATION, INC.,

and

BRUCE BABBITT, Secretary of the Interior, and NILES CESAR, Juneau Area Director of the Bureau of Indian Affairs.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The Reindeer Industry Act of 1937, as construed by the Secretary of the Interior and the district court, reserves exclusively for Alaska Natives a reindeer industry in Alaska. The non-Native private respondents claimed below that the Act is an unconstitutional racial classification, and that the equal-protection standard of review established in *Morton v. Mancari*, 417 U.S. 535 (1974)—that Indian classifications are valid if they are "tied rationally to the fulfillment of Congress' unique obligation toward the Indians"—was implicitly overruled by *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200 (1995). The Ninth Circuit surmised that "*Mancari*'s days [may be] numbered" and held that, in any event, *Mancari* "shield[s] only those statutes that affect uniquely Indian interests." Holding that the Act does not relate to "unique Indian concerns," and hence is subject to strict scrutiny, the Ninth Circuit rejected the Secretary's construction and, engaging in "constitutional narrowing," construed the Act to permit non-Natives to enter the reindeer industry with imported reindeer. The questions presented are:

1. Whether, in light of *Adarand Constructors, Inc. v. Peña*, the rational-basis standard of review adopted in *Morton v. Mancari* continues to apply to constitutional equal-protection challenges to congressional enactments singling out Native Americans for special treatment.

2. If so, whether application of the *Mancari* standard of equal-protection review of Indian classifications is restricted to those addressing "uniquely Indian interests."

3. Whether the Reindeer Industry Act, as construed by the Secretary to prohibit non-Natives from competing in the industry, is constitutional under the equal-protection component of the Fifth Amendment's Due Process Clause.

PARTIES TO THE PROCEEDINGS

Petitioner Kawerak Reindeer Herders Association, defendant-intervenor-appellee below, is an unincorporated association of seventeen Alaska Native reindeer herders who manage reindeer herds on and around the Seward Peninsula in Northwest Alaska. Petitioner is a project of Kawerak, Inc., the regional non-profit corporation formed by and serving the needs of the 20 Alaska Native tribes of the Bering Straits region. Kawerak, Inc., has no parent company or nonwholly owned subsidiary.

The private respondents named in the caption, plaintiffs-appellants below, are Thomas E. Williams and two of his Alaska for-profit corporations, Alaska Reindeer, Inc., and Reindeer Herders Association, Inc. The federal respondents, defendants-appellees below, are the Secretary of the Interior and the Juneau Area Director of the Bureau of Indian Affairs, in their respective official capacities.

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On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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PETITION FOR A WRIT OF CERTIORARI

Kawerak Reindeer Herders Association petitions for a writ of certiorari to review the judgment of the Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The Ninth Circuit opinion is reported at 115 F.3d 657 and reprinted in the appendix hereto ("App.") at 1a. The bench ruling of the District Court for the District of Alaska is unreported and reprinted at App. 27a. The opinion of the Interior Board of Indian Appeals is reported at 23 IBIA 28 and reprinted at App. 33a.

JURISDICTION

The judgment of the Court of Appeals was entered on 28 May 1997. App. 1a. A timely petition for rehearing with suggestion for *en banc* consideration was denied on 9 Octo-

ber 1997. App. 77a. On 24 December 1997 Justice O'Connor granted petitioner an extension of time until 6 February 1998 within which to file this petition (No. A-466). The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The equal-protection component of the Fifth Amendment to the United States Constitution derives from the Due Process Clause, which provides: "No person shall be . . . deprived of life, liberty, or property, without due process of law."

The Reindeer Industry Act of 1937, as amended, 25 U.S.C. §§ 500 *et seq.*, is reprinted at App. 79a-85a.

INTRODUCTION

This case presents issues of exceptional importance to Alaska Natives, as well as to the majority of the Nation's Indian population which is located in the eight Western States within the Ninth Circuit. The decision below casts into doubt the constitutional validity of much of the basic legislation enacted by Congress over the past two centuries that singles out Indians and Alaska Natives for special treatment because of their status as Native Americans. Although this case itself concerns the validity of the Reindeer Industry Act—a program that exists only in Alaska—the Ninth Circuit panel majority has called into question the continued viability of the doctrine first enunciated in *Morton v. Mancari*, 417 U.S. 535 (1974), governing equal-protection challenges to congressional Native American programs.

The Ninth Circuit, moreover, has adopted a wholly unprecedented equal-protection test under *Mancari* (on the assumption that it retains any vitality at all), which is sure to proliferate an incalculable amount of litigation challenging the numerous acts of Congress that single out Indians and Alaska

Natives for different treatment. Pursuant to this new test, the standard of equal-protection review laid down in *Mancari* and succeeding cases "shield[s] only those statutes that affect uniquely Indian interests." App. 18a. It is now the duty of judges, rather than Congress, to scrutinize each Indian classification and determine whether it is related to "unique Indian concerns" (*id.* at 16a), that is, whether it "relates to native land, tribal or communal status, or culture." *Id.*; *see also id.* at n.6 (the program must "relate to Indian land, tribal status, self-government, or culture"). Any Indian legislation that is unrelated to such "uniquely Indian interests" is subject to strict-scrutiny review.

With respect to Indian classifications deemed not related to "unique Indian concerns" (such as those merely aimed at "assisting natives economically" (App. 19a)), the panel majority expressed "little doubt that the government has compelling interests when it comes to dealing with Indians," and that "Title 25 [of the UNITED STATES CODE] will only be stripped of those laws that are not narrowly tailored." App. 19a-20a n.8. Yet, the most basic Indian legislation of all—the Snyder Act of 1921, 25 U.S.C. §§ 13 *et seq.* (appropriating money "for the benefit, care, and assistance of the Indians throughout the United States" for such purposes as education, health care, employment, general support, and emergency relief)—almost certainly would fail both the panel majority's "uniquely Indian interests" test for rational-basis review and the "narrowly tailored" requirement of strict-scrutiny review. These appropriations simply are not limited to activities on Indian land, nor do they implicate tribal status, self-government, or culture. They relate, rather, to interests that are not "uniquely Indian," but are shared generally by all persons. Similar statutory programs abound in the areas of Indian economic development, health care and education, and the validity of all of them is called into question by the decision below.

Furthermore, identifying which Indian statutes relate to "unique Indian concerns" under the panel majority's amorphous standard, and then determining which of those failing that test will satisfy the stringent strict-scrutiny standard of serving compelling governmental interests and being narrowly tailored, indisputably is a case-by-case process—with the potential pool of cases being at least as large as the number of statutory programs codified in Title 25 of the UNITED STATES CODE (to say nothing of the Indian statutes located elsewhere in the CODE, along with the numerous federal treaties, regulations, executive orders, and the like, dealing exclusively with the subject of Indians).

Before the federal courts, Indians, and Alaska Natives throughout the vast reaches of the Ninth Circuit are plunged into the untold and indeterminate litigation certain to ensue in the wake of the decision below, this Court should grant the writ and resolve the fundamental questions presented.

STATEMENT

1. As summarized in the majority opinion below (App. 5a-6a), the government introduced the reindeer industry to Alaska Natives over a century ago, in the early 1890's, at a time when "white settlers had just about exhausted the natural food supply." *Id.* at 5a; *see generally* H.R. REP. NO. 1188, 75th Cong., 1st Sess. 1-3 (1937); App. 34a-36a. The industry was thus introduced to the Natives primarily to compensate them for the demise of other natural resources "lost to Euro-American whalers and the caribou decline." RICHARD O. STERN, ET AL., ESKIMOS, REINDEER AND LAND 78-79 (Univ. of Alaska 1980) (hereafter "STERN"). The reindeer imported from Siberia, like their indigenous biological Alaska cousins, the caribou, are free-ranging animals that thrive in

the northern habitat.[1] During the first several decades following the introduction of reindeer herding to Alaska Natives, Congress addressed the subject in various appropriations acts, and the Secretary in regulations and Solicitor's opinions. *See* App. 36a n.3.; DAVID S. CASE, ALASKA NATIVES AND AMERICAN LAWS 8, 89, 196 (1984).

2a. When non-Natives thereafter "muscled into the reindeer business," as the Court of Appeals put it (App. 6a; *see also United States v. Lomen & Co.*, 8 Alaska Rep. 1 (D. Alaska 1921); CASE at 208-09), Congress responded, exercising a power reserved by the 1867 Treaty of Cession with Russia.[2] The Reindeer Industry Act was enacted for the express purpose of "provid[ing] subsistence for the Eskimos and other natives of Alaska by establishing for them a permanent and self-sustaining economy." 50 Stat. 900 (1 Sept. 1937) (preamble). Congress declared its policy and goal to be "to establish and maintain for the said natives . . . a reindeer industry or business," and to "preserv[e] the native character of the industry or business thus established." 25 U.S.C. § 500. Pursuant to these explicit objectives, Congress appro-

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[1] Congress has defined "reindeer" to "be understood to include reindeer and such caribou as have been introduced into animal husbandry or have actually joined reindeer herds, and the increase thereof." 25 U.S.C. § 500j. Reindeer are practically indistinguishable from indigenous caribou: "There are relatively few differences in behavior and morphology that allow one to distinguish between reindeer and caribou." STERN at 4. "In North America, reindeer in the wild are usually called caribou. In Siberia and Scandinavia, the term 'reindeer' usually refers to animals kept under human control (i.e., domesticated), while 'wild reindeer' is the term used to distinguish those animals which roam unherded in the wild." *Id.*

[2] "The uncivilized tribes will be subject to such laws and regulations as the United States may, from time to time, adopt in regard to aboriginal tribes of that country." Article III, 15 Stat. 539, 542 (30 Mar. 1867).

propriated money to the Secretary, gave him the power of eminent domain, and instructed him to buy all reindeer and related facilities owned by non-Natives in order to "to establish and maintain for [Alaska Natives] a *complete and self-sustaining* economy" in the operation of all aspects of which the Natives were to become responsible. § 500f (emphasis added). Congress further required that thereafter non-Natives had to file declarations of ownership of any reindeer that came into their hands (§ 500b), and proscribed the sale of live Native-owned and government-owned reindeer (the only ones that would remain in Alaska, as Congress then saw it) to non-Natives, unless they were butchered within 30 days or shipped out never to return. § 500i.

b. As directed by the Act, the Secretary acquired all reindeer and related facilities owned by non-Natives, the acquisition program being completed in 1939-40 at a total cost of less than $500,000. App. 38a. For the next 50 years, the assumption that the Act barred non-Natives from re-entering the reindeer business in Alaska animated administrative practice and understanding, and went unquestioned. App. 10a, 38a-39a. Congress did nothing to alter that presumption when Alaska was admitted to the Union in 1959,[3] and it left the program in place when it passed the Alaska Native Claims Settlement Act of 1971, 43 U.S.C. §§ 1601 *et seq.* And the Secretary (through the Bureau of Land Management) has long and consistently restricted reindeer grazing on the public lands to Native herders. 43 C.F.R. § 4310.2; App. 39a.

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[3] Indeed, § 4 of the Alaska Statehood Act required Alaska and its people to "forever disclaim all right and title to . . . any lands or other property (including fishing rights), the right or title to which may be held by [Alaska Natives] or is held by the United States in trust for said natives," which property and rights "shall be and remain under the absolute jurisdiction and control of the United States until disposed of under its authority." 72 Stat. 339 (1958), *amended*, 73 Stat. 141 (1959).

c. In 1986 Congress amended the Act for the first and only time by overruling the Ninth Circuit's decision in *Karmun v. Commissioner*, 749 F.2d 567 (9th Cir. 1984), *cert. denied*, 474 U.S. 819 (1985), and expressly exempting Native reindeer herders (retroactively and prospectively) from federal income taxation "during the period of the trust." Pub. L. No. 99-514, § 1709, 100 STAT. 2085, 2783 (22 Oct. 1986), adding the *proviso* to the first sentence of 25 U.S.C. § 500g.

3a. Later in 1986, however, respondent Williams, a non-Native lawyer and businessman, informed respondent Juneau Area Director of the Bureau of Indian Affairs ("BIA") of his intent to import reindeer from Canada and use them to establish a private commercial herd in Alaska. App. 39a. Respondent Williams' inquiry into whether the Act prohibited his proposed enterprise was answered in the negative in early 1987 by a lawyer in the Regional Solicitor's Office (*id.* at 39a-42a), who reaffirmed his opinion in May 1989. *Id.* at 44a-46a. (Respondent then imported 19 reindeer from Canada and started a herd (*id.* at 42a-43a), which by 1991 had grown to 248 animals. *Id.* at 48a.)

b. The Regional Solicitor's lawyer rested his opinion on a "loophole" in the Act (App. 40a), discerned from the restrictions on alienation set forth in 25 U.S.C. § 500i, which apply to "[l]ive reindeer in Alaska, and the increase thereof, acquired by the Secretary . . . [or] owned by the said natives." This language was deemed to leave open the ability of non-Natives in Alaska to acquire for commercial purposes animals from outside the State that were neither present in the Territory in 1937 nor descended from those that were. App. 41a. This opinion recognized "'that establishment of non-Native commercial herds could have a serious impact on the Alaska Native reindeer industry'" (*id.* at 40a), but concluded that such impacts could be avoided on a future case-by-case basis through the Secretary's statutory power in perpetuity "'to

acquire the non-Native owned reindeer by purchase or exercise of the power of eminent domain.'" *Id.*

c. Petitioner filed an action in the district court in 1991 challenging the Regional Solicitor's interpretation of the Act, but agreed to dismiss that suit when the Area Director of the BIA agreed to render an appealable decision, which was done. App. 48a. Petitioner then appealed to the Interior Board of Indian Appeals ("IBIA" or "Board"), the Secretary's delegated decision-maker in such matters, and respondent Williams was allowed to intervene. App. 49a. Following briefing, the Board released a comprehensive decision on 13 November 1992. App. 33a-76a. The Board held that "the Reindeer Act must be construed to prohibit non-Native entry into the reindeer industry in Alaska, regardless of the source of the reindeer involved." *Id.* at 73a.

4a. Private respondents challenged the Secretary's final decision by commencing this action in the district court on 3 June 1994 against the federal respondents. Petitioner was permitted to intervene. On 26 April 1995, the district court issued a bench ruling granting summary judgment to the federal respondents and petitioner on all of private respondents' claims for relief. App. 27a-32a. The court agreed with the IBIA's construction of the Act, "that when read as a whole, the statute clearly evidences a plan by Congress to provide that there would be a Reindeer industry in Alaska that would be exclusively Native." *Id.* at 30a. The court rejected private respondents' constitutional challenges, concluding that the Act "is simply not infected with the virus of racial discrimination." *Id.* Relying on this Court's *Mancari* line of decisions, the district court held "that Congress had the power to treat with these folks [Alaska Natives] in a fashion such that the ordinary equal protection analysis doesn't apply," because the Act was "predicated upon the power of Congress to treat with Indians" (*id.* at 31a); "Congress was not setting one race

above another, but rather was treating with the original aboriginal sovereigns that it found here in North America when our government was established." *Id.* at 30a.

b. Private respondents appealed, and the Ninth Circuit reversed. App. 1a. As mentioned earlier (pp. 2-3), the panel majority questioned the continued viability of the *Mancari* standard of rational-basis review of equal-protection challenges to Indian classifications (App. 19a),[4] and expressed the conviction that the strict-scrutiny standard of *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200 (1995), "would almost certainly render the Reindeer Act unconstitutional. Assuming that Congress has a compelling interest in assisting natives economically, the IBIA's interpretation precludes any chance of defending the Reindeer Act as narrowly tailored to serve that interest." App. 19a-20a (footnote omitted).

With this cloud of doubt as to the appropriate standard of constitutional review thus hanging in the air, the panel majority, apparently assuming *arguendo* that the *Mancari* doctrine retains some vitality, held nonetheless that "we do read it as shielding only those statutes that affect uniquely Indian interests." App. 18a. Applying this entirely unprecedented "uniquely Indian interests" test to the Reindeer Act, the panel majority viewed the Act as "a naked preference for Indians unrelated to unique Indian concerns," ruling that it "provides a preference in an industry that is not uniquely native," in that it "in no way relates to native land, tribal or communal status, or culture." *Id.* at 16a. The majority distinguished a number

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[4] For the speculation that "*Mancari*'s days [may be] numbered" (App. 19a), the majority relied upon JUSTICE STEVENS' dissenting argument in *Adarand* that the Court's "concept of 'consistency'" in that case "would view the special preferences that the National Government has provided to Native Americans since 1834 as comparable to the official discrimination against African Americans that was prevalent for much of our history." 515 U.S. at 244-45 (footnote omitted).

of Indian statutes on the ground that they "all relate to Indian land, tribal status, self-government, or culture" (*id.* at n.6), which somehow the Reindeer Act does not.

On the basis of these views, the panel majority concluded that the Secretary's construction of the Act, albeit "not unreasonable" (App. 10a) and otherwise entitled to deference under *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), raised "constitutional problems [that] are truly 'grave'" (App. 14a), which called judicial "constitutional narrowing" into play. *Id.* at 13a. The court thereupon adopted what it deemed to be "a less constitutionally troubling construction" of the Act, namely, "as not precluding non-natives in Alaska from owning and importing reindeer." *Id.* at 21a.

c. Judge Brunetti concurred in the result, but he believed the Act's plain language foreclosed the Secretary's interpretation and that it was not necessary "to resolve [the] constitutional questions posed by" that construction. App. 22a. (The majority rejected Judge Brunetti's perceived view that *Chevron* deference was inappropriate with respect to the Secretary "filling in a gap in a statute" resulting from congressional silence. *Id.* at 10a n.4.)

REASONS FOR GRANTING THE WRIT

I. The Issue Of *Mancari*'s Continued Vitality Is A Constitutional Question Of Extraordinary Importance And Should Be Decided By This Court.

The equal-protection challenge to the employment preference for Indians in the Bureau of Indian Affairs (mandated by the Indian Reorganization Act of 1934) came before this Court in *Morton v. Mancari*, 417 U.S. 535 (1974), in the context of a constitutional tradition which had always acknowledged that "the relation of the Indians to the United

States is marked by peculiar and cardinal distinctions which exist no where else." *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 16 (1831). The Court had long held that "'[i]t may be taken as the settled doctrine of this court that Congress, in pursuance of the long-established policy of the government, has a right to determine for itself when the guardianship which has been maintained over the Indian shall cease. It is for that body, and not for the courts, to determine when the true interests of the Indian require his release from such condition of tutelage,'" so long as Congress does not act "arbitrarily." *United States v. Sandoval*, 231 U.S. 28, 46 (1913) (citations omitted). "[I]n determining what is reasonably essential to the protection of the Indians, Congress is invested with a wide discretion, and its action, unless purely arbitrary, must be accepted and given full effect by the courts." *Perrin v. United States*, 232 U.S. 478, 486 (1914).

The unanimous Court in *Mancari* accordingly grounded its rejection of the challenge to the Indian employment preference in the "origin and nature of the special relationship" between the United States and Indians (417 U.S. at 552), "a unique legal status [that] is of long standing." *Id.* at 555. Noting that it had frequently "upheld legislation that singles out Indians for particular and special treatment" (*id.* at 554-55), the Court set forth an equal-protection standard of judicial review that is now familiar (*id.* at 555):

> As long as the special treatment can be tied rationally to the fulfillment of Congress' unique obligation toward the Indians, such legislative judgments will not be disturbed.

Thus, in 1979 the Court would say that it "has repeatedly held that the peculiar semisovereign and constitutionally recognized status of Indians justifies special treatment on their behalf when rationally related to the Government's 'unique obligation toward the Indians.'" *Washington v. Washington*

State Commercial Passenger Fishing Vessel Ass'n, 443 U.S. 658, 673 n.20 (1979), quoting *Mancari*, 417 U.S. at 555, and citing *United States v. Antelope*, 430 U.S. 641 (1977), and *Antoine v. Washington*, 420 U.S. 194 (1975). *See also Washington v. Confederated Bands & Tribes of the Yakima Indian Nation*, 439 U.S. 463, 500-01 (1979); *Delaware Tribal Business Committee v. Weeks*, 430 U.S. 73, 84-85 (1977); *Moe v. Confederated Salish & Kootenai Tribes*, 425 U.S. 463, 479-80 (1976); *Fisher v. District Court*, 424 U.S. 382, 390 (1976) (*per curiam*). These decisions, in sum, recognize that, by operation of the Constitution, Congress possesses a singularly unique authority over matters affecting Indians, who in turn possess a singularly unique status in the constitutional plan; in addition, the government has a guardian-ward relationship with Indians that only Congress can terminate. *See, e.g, Mancari*, 417 U.S. at 551-53.[5]

As the Court said in *Mancari* (*id.* at 552), and repeated in *Moe* (425 U.S. at 480) and *Antelope* (430 U.S. at 645), with respect to the numerous Indian statutes:

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[5] In *Mancari*, 417 U.S. at 552, the Court illustrated the unique status of Indians by quoting the following from *Board of County Comm'rs v. Seber*, 318 U.S. 375, 383-84 (1943):

> "In the exercise of the war and treaty powers, the United States overcame the Indians and took possession of their lands, sometimes by force, leaving them an uneducated, helpless and dependent people, needing protection against the selfishness of others and their own improvidence. Of necessity the United States assumed the duty of furnishing that protection, and with it the authority to do all that was required to perform that obligation and to prepare the Indians to take their place as independent, qualified members of the modern body politic. . . ."

The *Mancari* Court also (417 U.S. at 552) cited *United States v. Kagama*, 118 U.S. 375, 383-84 (1886).

> If these laws, derived from historical relationships and explicitly designed to help only Indians, were deemed invidious racial discrimination, an entire Title of the United States Code (25 U.S.C.) would be effectively erased and the solemn commitment of the Government toward the Indians would be jeopardized.

The Court has consistently applied the *Mancari* standard of review across the broad range of legislative Indian classifications, whether the alleged discrimination favored or benefited Indians (as in *Mancari*, *Moe*, and *Fishing Vessel*), or was seen as a burden or disadvantage to individual Indians (as in *Fisher*, *Yakima*, and *Antelope*); or where one group of similarly situated Indians was benefited to the disadvantage of another (as in *Weeks*). The Court recently reaffirmed that, although Indians also are citizens, that "does not alter the Federal Government's broad authority to legislate with respect to enrolled Indians as a class, whether to impose burdens or benefits." *Duro v. Reina*, 495 U.S. 676, 692 (1990), citing *Antelope* and *Mancari*. Nothing has occurred in the decades since *Mancari* to alter the Court's view of the sweeping plenary power of Congress over Indian commerce and affairs. *See, e.g., Seminole Tribe of Florida v. Florida*, 116 S. Ct. 1114, 1126 (1996); *Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163, 191-92 (1989).

During the period in which this Court unanimously formulated and applied the *Mancari* standard for evaluating equal-protection challenges to congressional acts and treaties singling out Indians for special treatment, equal-protection analysis under the Fifth Amendment was, as it is today, "the same as that under the Fourteenth Amendment," *Weeks*, 430 U.S. at 75 n.1—i.e., strict scrutiny applied to racial classifications but not to Indian classifications. Although uncertainty reigned during this era as to the appropriate level of heightened scrutiny to be applied to "remedial" or

"affirmative action" racial classifications, *see Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 213-223 (1995), no Justice of the Court has ever expressly questioned the continuing validity of the *Mancari* standard for assessing the constitutionality of Indian classifications.[6] While the conceptual framework and theoretical foundation of the *Mancari* doctrine have long been debated among the commentators,[7] neither this Court (as conceded in the opinion below (App. 15a)) nor any other has ever invalidated an Indian classification (federal or State) under the *Mancari* standard.

But while nothing this Court has said about Indian classifications appears to have "eroded" the *Mancari* doctrine, *compare Agostini v. Felton*, 117 S. Ct. 1997 (1997), the debate over *Mancari*'s viability has only intensified in the wake of

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[6] The Ninth Circuit's reliance (App. 19a) on JUSTICE STEVENS' dissent (joined by one other Justice) in *Adarand* seems off the mark. JUSTICE STEVENS' argument (*see* note 4, *supra*) appears merely to reaffirm the distinct constitutional status of "special preferences" for Native Americans. In all events, the Court, which responded at length to JUSTICE STEVENS' dissent, did not mention Indian classifications. *See Adarand*, 515 U.S. at 227-231.

[7] *See* Stuart M. Benjamin, *Equal Protection and the Special Relationship: The Case of Native Hawaiians*, 106 YALE L. J. 537 (1996); Wayne R. Farnsworth, Note, *Bureau of Indian Affairs Hiring Preferences After* Adarand Constructors, Inc. v. Peña, 1996 B.Y.U. L. REV. 503; David C. Williams, *Sometimes Suspect: A Response to Professor Goldberg-Ambrose*, 39 UCLA L. REV. 201 (1991); Carole E. Goldberg-Ambrose, *Not "Strictly" Racial: A Response To "Indians As Peoples,"* 39 UCLA L. REV. 169 (1991); David C. Williams, *The Borders of the Equal Protection Clause: Indians as Peoples*, 38 UCLA L. REV. 759 (1991); Robert N. Clinton, *Isolated in Their Own Country: A Defense of Federal Protection of Indian Autonomy and Self-Government*, 33 STAN. L. REV. 979 (1981); Ralph W. Johnson & E. Susan Crystal, *Indians and Equal Protection*, 54 WASH. L. REV. 587 (1979). *See also* FELIX S. COHEN'S HANDBOOK OF FEDERAL INDIAN LAW 653-58 (1982 ed.)

this Court's holdings that full-blown strict scrutiny applies even to so-called "benign" racial classifications, whether governed by the Equal Protection Clause of the Fourteenth Amendment, *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989), or by the Due Process Clause of the Fifth Amendment, *Adarand* (1995). *See, e.g.*, the recent commentary cited in note 7, *supra*. Though the Ninth Circuit in the case at bar did not consider itself free (for obvious reasons, *see Agostini*, 117 S. Ct. at 2017) to announce *Mancari*'s demise, the panel majority did feel emboldened to predict that "*Mancari*'s days [may be] numbered" (App. 19a), and that "Title 25 [of the UNITED STATES CODE] will . . . be stripped of those laws that are not narrowly tailored." *Id.* at 20a n.8.

Only this Court can settle this extremely important debate. For the reasons which follow, the Court should settle the question now rather than later.

II. The Ninth Circuit's Unprecedented Revision of the *Mancari* Standard, By Encumbering It With A Highly Subjective Four-Part "Unique Indian Concerns" Test, Places In Constitutional Jeopardy Much Important Indian Legislation And Creates An Unworkable And Unpredictable Standard Of Constitutional Review.

1. In *Mancari* and its progeny, the Court has focused the rational-relation constitutional inquiry on the government's "unique obligation toward the Indians." As noted above, the *Mancari* standard asks whether the special treatment accorded Native Americans is tied rationally to the *unique obligations of the government* to Indian peoples—whether the separate treatment is rationally related to the unique "special relationship" (*Mancari*, 417 U.S. at 552) between the United States and the Indians, and their "peculiar semisovereign and constitutionally recognized status" (*Fishing Vessel*, 443 U.S.

at 673 n.20), that has existed since adoption of the Constitution. This is a relatively objective standard that has proved quite workable.

The panel majority, by contrast, has replaced this standard with a test that asks whether the special treatment of Indians is related, not to the government's unique constitutional trust responsibility and plenary authority, but rather to "*unique Indian concerns*" (App. 16a)—to be measured by application of a four-factor analysis assessing whether the special treatment relates "to native land, tribal or communal status, or culture" (*id.*), or to "Indian land, tribal status, self-government, or culture." *Id.* at n.6. *See also id.* at 18a ("we do read [*Mancari*] as shielding only those statutes that affect uniquely Indian interests").[8] If this "uniquely Indian interests" test is not satisfied, strict scrutiny is triggered and the classification accordingly "must serve a compelling governmental interest, and must be narrowly tailored to further that interest." *Adarand*, 515 U.S. at 235. This is "the most demanding test known to constitutional law." *City of Boerne v. Flores*, 117 S. Ct. 2157, 2171 (1997).

A deferential standard of constitutional review which this Court has heretofore steadfastly centered on the uniqueness of the legal status of Indians and the corresponding special relationship of the government with them, has now been con-

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[8] The following explanation is offered for the new test (App. 17a-18a):

> Legislation that relates to Indian land, tribal status, self-government or culture passes *Mancari*'s rational relation test because "such regulation is rooted in the unique status of Indians as 'a separate people' with their own political institutions" *United States v. Antelope*, 430 U.S. 641, 646 (1977). As "a separate people," Indians have a right to expect some special protection for their land, political institutions (whether tribes of native villages), and culture.

verted by the panel majority into an open-ended, unfocused judicial inquiry into the uniqueness of Indian concerns—the very subject matter that *Mancari* and its progeny hold to be within the rational discretion of Congress. While this Court has employed the word "unique" in the *Mancari* line of cases, it has used the term uniformly with reference to the uniqueness of the federal-Indian relationship and the constitutional status of aboriginal peoples, *not* to launch the courts into a subjective inquiry into the blurry issue of whether a particular subject matter addressed by Congress is "uniquely Indian."

The Ninth Circuit has thus misapprehended the *Mancari* standard of constitutional review in "an abrupt and largely unexplained departure" from long-established precedent, *cf. Continental T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36, 47 (1977), which propels the courts into a critically important area reserved to the legislative branch of government. This apparent break with "the fabric of the law" (*Adarand*, 515 U.S. at 234) woven by this Court's precedents in itself presents a compelling reason for the exercise of this Court's discretion to review the judgment below. Rule 10(c).

2. Yet the most compelling need for this Court's review arises from the profound conflict, uncertainty and confusion in the law resulting from the panel majority's new test, which will now be applicable throughout the Ninth Circuit and to the numerous Indian classifications present there.[9] The standard of review adopted below has sweeping and unsettling ramifications, and is certain to engender constitutional assaults on a broad range of congressional programs designed to improve and further Indian health care, education, general

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[9] Over 400 (nearly three-fourths) of the federally recognized Indian and Alaska Native tribes in the United States are located in the eight Western States within the Ninth Circuit. *See* 62 Fed. Reg. 55,270-55,275 (23 Oct. 1997).

welfare, and economic development and self-sufficiency—interests that scarcely qualify as "uniquely Indian." The new test, moreover, is as difficult to apply and as unpredictable in its outcome as its origins are to discover. These consequences are exemplified by the Ninth Circuit's application of the new test to this very case, as well as a host of other examples to which it will apply. In short, although this new standard of review was devised for the ostensible purpose of avoiding unnecessary constitutional adjudication, it cannot possibly serve that goal in practice.[10]

In applying its new test here and holding that the Reindeer Industry Act "provides a preference in an industry that is not uniquely native" (App. 16a), the panel majority in fact decided the very constitutional issue it purported to avoid, that is, it in effect held that the Act is not tied rationally to Congress' unique obligations toward Alaska Natives (or, more precisely under the panel majority's new formulation, that the Act is not rationally related to the *unique concerns of Alaska Natives pertaining to their land, tribal or communal status, self-government, or culture*). Without expressly finding that Congress had acted arbitrarily, the majority below has thus arrogated to the judiciary in the first instance the determination of what programs best advance Congress' unique obliga-

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[10] In fact, it does not even accomplish that objective in the context of this controversy. As the panel majority practically concedes, the Reindeer Act itself is sure to be the object of further constitutional challenge. *See* App. 21a n.9 ("We do not suggest that, once stripped of the ban on non-native ownership [of imported reindeer], the Reindeer Act will be immune from further constitutional scrutiny"). For examples, even as construed by the court below, the Reindeer Act continues quite plainly to require non-Natives alone to file declarations of reindeer ownership with the Secretary (25 U.S.C. § 500b), subjects only non-Natives to having their reindeer businesses condemned by the Secretary (§ 500a), and prohibits non-Natives from grazing reindeer on the public lands (§ 500m; 43 C.F.R. § 4310.2). *See also* note 14, *infra*.

tions to Alaska Natives (or the determination of what constitutes the unique interests of Alaska Natives, under the majority's new test). Judges are ill-equipped to make such policy determinations, as this case well illustrates.[11]

But even assuming that "uniquely Indian interests" are a sufficient constitutional basis upon which to sustain an act of government singling out Indians for different treatment,[12] it is impossible to fathom why or how the Reindeer Industry Act, but not the numerous other congressional Indian economic-development programs listed in the panel opinion (App. 16a-17a n.6), transgresses or even approaches the new "unique Indian concerns" constitutional line. The only plausible explanation is that the panel majority has adopted a subjective

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[11] The panel majority's contention that "the economic and subsistence needs of [Alaska] natives have changed dramatically in the interim [since passage of the 1937 Act]" (App. 20a), is precisely the sort of judgment for Congress, not the courts, to make. This particular hypothesis, moreover, is contradicted by the Circuit's own prior decisions, *see, e.g., United States v. Alexander*, 938 F.2d 942, 945 (9th Cir. 1991) (Kozinski, J.) ("Many Alaska natives who are not fully part of the modern economy rely on fishing for subsistence. If their right to fish is destroyed, so too is their traditional way of life"); *Kenaitze Indian Tribe v. Alaska*, 860 F.2d 312 (9th Cir. 1988) (Kozinski, J.), *cert. denied*, 491 U.S. 905 (1989); *Native Village of Quinhagak v. United States*, 35 F.3d 388 (9th Cir. 1994), as well as by acts of Congress. *See, e.g., Alaska ex rel. Yukon Flats School Dist. v. Native Village of Venetie Tribal Gov.*, 101 F.3d 1286, 1297-98 (9th Cir. 1996), *cert. granted*, 117 S. Ct. 2478 (1997) (No. 96-1577).

[12] *But see Olsen v. Drug Enforcement Admin.*, 878 F.2d 1458, 1469 (D.C. Cir. 1989) (Buckley, J., dissenting): "'[T]he special treatment of Indians under our law does not stem from the unique features of Indian religion and culture. With respect to these matters, Indians stand on no different footing than do other minorities in our pluralistic society'" (quoting DEA memorandum). *Cf. id.*. at 1464 (opinion of GINSBURG, J.); *Rupert v. Director, U.S. Fish & Wildlife Service*, 957 F.2d 32, 34-35 (1st Cir. 1992) (*per curiam* by BREYER, C.J., Selya & Cyr, JJ.).

standard for assessing the existence of "uniquely Indian interests" that freezes Native culture and economy at some (unspecified) point in the very distant past. For it is indisputable that, though reindeer herding by Alaska Natives does not date from time immemorial, during the century that it has existed it has become an integral component of the socioeconomic and cultural structure of those Native villages in which it takes place.[13]

As noted above (pp. 4-5), moreover, it is common ground that the industry was initiated by the government for Alaska Natives in significant part to compensate them for the loss of other natural resources depleted by non-Native newcomers. If this is not a "unique Native interest" related to land, culture and communal status, it is difficult to imagine one. No authority is cited for the implicit assumption that the sole measure of "unique Native concerns" is the situation extant prior to contact with the non-Native immigrants—but then there is no authority for this test in the first place.

Manifestly, it would seem, Congress in the Reindeer Act was responding to the unique concerns of Alaska Natives in the context of an economic endeavor the government had initiated for their benefit, which replaced an animal whose presence had declined (caribou) with a biologically indistinguishable one (reindeer) that, although free-ranging, was domesticated and capable of being herded, and which formed the foundation of an industry that otherwise would not exist in

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[13] *See, e.g.*, STERN 9, 104-25, 162-64. For further example, an unpublished (and undated) paper submitted to the Court of Appeals by private respondents, and cited by the panel majority (App. 6a n.1), acknowledges that "[a]lthough the practice of reindeer herding was a relatively late arrival to the Alaskan northwest [over 100 years ago], it has come to form a significant aspect of Inupiat culture." Hugh Beach, *The Reindeer-Caribou Conflict in the NANA Region of Alaska: A Case Study for Native Minority Rights Issues*, at 1.

the United States. Surely the Act is grounded in the government's trust responsibility and "tied rationally to Congress' unique obligation toward [Alaska Natives]," *Mancari*, 417 U.S. at 555.

Yet, for reasons petitioner and future litigants and courts can only guess about, the Reindeer Act was held not to satisfy the "uniquely Indian interests" test. While proclaiming its dedication to the avoidance of unnecessary constitutional adjudication,[14] the panel majority has adopted a new constitu-

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[14] This Court has repeatedly emphasized that "'[w]e cannot press statutory construction to the point of disingenuous evasion even to avoid a constitutional question.'" *Salinas v. United States*, 118 S. Ct. 469, 475 (1997), *quoting Siminole Tribe of Florida v. Florida*, 116 S. Ct. 1114, 1124 n.9 (1996) (internal quotation marks omitted); *see also, e.g., Rust v. Sullivan*, 500 U.S. 173, 191 (1991), *quoting George Moore Ice Cream Co. v. Rose*, 289 U.S. 373, 379 (1933). There are strong indications that the Ninth Circuit has done just that in this case. The panel majority rejected the Secretary's interpretation of the Reindeer Act because there assertedly was "a less constitutionally troubling construction [which] is readily available" (App. 21a), *to-wit*, one that does not prevent non-Natives in Alaska from importing reindeer from outside Alaska and entering the reindeer business.

But the panel's construction of the Act in fact is neither "less constitutionally troubling" nor very plausible. This is because that reading of the Act, while it might somewhat ameliorate the perceived discrimination against non-Natives, results in palpable harm to Alaska Natives *qua* Natives. On the panel's view, the Act now allows non-Natives to import reindeer for commercial purposes, *including selling them to other non-Natives without restriction*. At the same time, of course, it cannot be gainsaid that the Act, *in haec verba*, in all circumstances prohibits Alaska Natives from selling any reindeer they own to non-Natives (except for slaughter or export). (The Act explicitly proscribes that "live reindeer in Alaska, and the increase thereof, owned by the said natives of Alaska or corporations, associations, or other organizations of said natives, *however acquired*, shall not be sold or transferred" to non-Natives, unless they are butchered or exported and "never brought back alive." 25 U.S.C. § 500i (emphasis added).) Thus, as construed by the

tional test whose very nebulousness will bring about that eventuality. The majority's assertion that "Title 25 [of the UNITED STATES CODE] will only be stripped of those laws that are not narrowly tailored" (App. 20a n.8), furthermore, virtually assures that basic government programs singling out Indians for special treatment, whose validity until now had been assumed on the basis of settled precedent, will be subjected to renewed constitutional attack. And many of those programs, in turn, will be struck down, for there simply is no principled way to distinguish the Reindeer Act from numerous other congressional schemes for promoting the general economic well-being of Indian peoples.

3. Although the examples are many, one program of particular concern to Alaska Natives whose validity is called into question by the panel majority's new-found approach is the Marine Mammal Protection Act of 1972, enacted the year following passage of the Alaska Native Claims Settlement Act. Contrary to the understanding of the majority below, the MMPA exemption for Alaska Natives is *not* limited to the "taking of animals for subsistence or cultural purposes." App. 17a. That Act, in exempting Alaska Natives and they alone from the ban on the taking of marine mammals, not only authorizes their taking for subsistence but also for the "purposes of creating and selling authentic native articles of handicrafts and clothing," providing specifically that such articles "may be sold in interstate commerce," and that marine mammal meat "may be sold in native villages and towns in

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panel majority (and as Judge Brunetti would also construe it, App. 22a-25a (separate concurrence)), the Act allows non-Natives, *but not Natives*, to import reindeer into Alaska and sell them to other non-Natives for commercial purposes—a very "big leg up in the business" (*cf.* App. 7a) that not only ensures the demise of the Native reindeer industry (contrary to the undisputed will of Congress) but also constitutes a rank discrimination against Natives. Surely this implausible construction of congressional intent is at least as "troubling" as the Secretary's.

Alaska or for native consumption." 16 U.S.C. § 1371(b); *see Didrickson v. United States Dept. of Interior*, 982 F.2d 1332 (9th Cir. 1992).[15]

A broader example is the Snyder Act, 25 U.S.C. §§ 13 *et seq.*, a program of immense importance both to Alaska Natives and to Indians nationwide. *See Morton v. Ruiz*, 415 U.S. 199 (1974). Pursuant to this Act, Congress has appropriated billions of dollars "for the benefit, care, and assistance of the Indians throughout the United States," with respect to such matters as "General support and civilization, including education," "For relief of distress and conservation of health," "For industrial assistance and advancement . . . ," and the like. 25 U.S.C. § 13. None of these subjects is obviously related to "Indian land, tribal status, self-government, or culture," at least not in any way that distinguishes them from the Reindeer Act, and they are equally vulnerable under the Ninth Circuit's illusory "unique Indian concerns" test. There are many other examples in which Congress has singled out Indians as an exclusive class for special treatment in the areas of general welfare, economic development and self-sufficiency,[16]

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[15] The MMPA, which totally prohibits non-Natives from hunting marine mammals, also refutes the panel majority's assertion that no other Indian law "gives Natives so broad a preference" as the Reindeer Act. App. 16a. *See also, e.g.*, 16 U.S.C. §§ 712(1) (migratory birds) and 1153 (fur seals). The majority's further effort (App. 17a) to distinguish "hunting and fishing wild game [as] an integral and time-honored part of native subsistence culture," from the century-old practice of herding free-ranging reindeer on the open tundra (deemed to be synonymous with "raising livestock"), shows how truly subjective the test is. *Compare* 25 U.S.C. §§ 442-443 (government program for lending livestock to Indians).

[16] *See, e.g.*, Johnson-O'Malley Act, 25 U.S.C. §§ 452-457 (authorizing Secretary to contract with States and other entities "for the education, medical attention, agricultural assistance, and social welfare,

and even education, health, and safety.[17]

As these examples suggest, the Ninth Circuit's new equal-protection test for Indian classifications has far-reaching and unpredictable consequences. It almost certainly will immerse the courts throughout the Circuit in much confusing, time-consuming, expensive and divisive litigation, and it undoubtedly "place[s] the law in an 'unstable condition.'" *Adarand*, 515 U.S. at 232 (citation omitted). The Court should grant review and determine whether this is really necessary.

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including relief of distress, of Indians"); 25 U.S.C. § 306 (authorizing "expenditures for the purpose of encouraging industry and self-support among the Indians and to aid them in the culture of fruits, grains, and other crops"); 25 U.S.C. §§ 309 *et seq* (authorizing vocational training program to help Indians "obtain reasonable and satisfactory employment"); 25 U.S.C. § 450e(b) (requiring that training and employment preferences be given to Indians in connection with government contracts with and grants to Indian organizations or for the benefit of Indians, and giving preference in the award of subcontracts and subgrants to Indian organizations and Indian-owned economic enterprises); 25 U.S.C. §§ 1451-1543 (Indian Financing Act, creating government-funded program to provide credit not available from the private sector and make loans to individual Indians and Indian organizations for the purpose of "promot[ing] economic development"); *cf.* 25 U.S.C. §§ 305 *et seq.* (establishing Indian Arts and Crafts Board "to promote the economic welfare of the Indian tribes and Indian individuals through the development of Indian arts and crafts and the expansion of the market [therefor]")

[17] "The power over Indian affairs is unusual in our federal system because it includes general federal authority to legislate over health, safety, and morals." FELIX S. COHEN'S HANDBOOK OF FEDERAL INDIAN LAW 219 (1982 ed.). *See, e.g.*, 25 U.S.C. §§ 1601-1683 (Indian Health Care and Improvement Act); 25 U.S.C. §§ 1801-1852 and 3301-3371 (community colleges and higher education); 25 U.S.C. §§ 2001-2026 (Indian Education Act); 25 U.S.C. §§ 2401-2455 (Indian Alcohol and Substance Abuse Prevention and Treatment Act).

III. The Ninth Circuit's "Unique Indian Concerns" Test Conflicts With The Decisions Of All Other Circuit And State Courts Which Have Applied The *Mancari* Standard of Review.

The other Courts of Appeals, as well as the State courts, that have been called upon to apply the *Mancari* standard of equal-protection review, have done so without perceiving the need to convert the standard into a "uniquely Indian interests" test. *See Rupert v. Director, U.S. Fish & Wildlife Service*, 957 F.2d 32 (1st Cir. 1992) (*per curiam*, by BREYER, Selya and Cyr, JJ.) (federal law permitting Indians, but prohibiting non-Indians, to use eagle feathers in religious ceremonies); *Peyote Way Church of God v. Thorngurgh*, 922 F.2d 1210 (5th Cir. 1991) (federal and State laws prohibiting peyote possession by all except members of the Native American Church); *United States v. Aanerud*, 893 F.2d 956 (8th Cir.) (federal law prohibiting non-members of a tribe, but not tribal members, from trapping leeches, even though tribal members had only been trapping leeches for fifteen years), *cert. denied*, 498 U.S. 822 (1990); *Livingston v. Ewing*, 601 F.2d 1110 (10th Cir.) (State and local laws permitting only Indians to sell handmade goods in certain public places), *cert. denied*, 444 U.S. 870 (1979); *Byzewski v. Byzewski*, 429 N.W.2d 394 (N.D. 1988) (State court action requiring non-Indian to pursue divorce in tribal court); *State v. Forge*, 262 N.W.2d 341 (Minn. 1977) (State law requiring special fishing licenses for non-members of a tribe), *appeal dismissed*, 435 U.S. 919 (1978); *Lohnes v. Cloud*, 254 N.W.2d 430 (N.D. 1977) (State law excluding tribal court judgments from coverage of State unsatisfied judgment fund); *cf. Olsen v. Drug Enforcement Admin.*, 878 F.2d 1458, 1464 (D.C. Cir. 1989) (GINSBURG, J.), *cert. denied*, 495 U.S. 906 (1990); *see also Littlewolf v. Lujan*, 877 F.2d 1058 (D.C. Cir. 1989), *cert. denied*, 493 U.S. 1043 (1990); *St. Paul Intertribal Housing*

Board v. Reynolds, 564 F. Supp. 1408 (D. Minn. 1983). To be sure, some of these cases involved subjects that probably would qualify as "unique Indian concerns," but these courts did not employ *that* as the standard of constitutional review.

The panel majority below also departed inexplicably from the Ninth Circuit's own precedents. Until the case at bar, that court (like all the others), had taken this Court at its word and held that:

> Traditional equal protection analysis, which requires a compelling state interest to justify invidious racial discrimination, does not apply to legislation or governmental action favoring Indians.

United States v. Decker, 600 F.2d 733, 740 (9th Cir.), *cert. denied*, 444 U.S. 855 (1979). And in the specific context of a government economic-development program giving a preference to Native-owned businesses to construct housing in Alaska Native villages, a prior Ninth Circuit panel, citing the Reindeer Industry Act of 1937 as an example of Congress' constitutional authority to single out Alaska Natives for special treatment (*see* 694 F.2d at 1168-69 n.10), expressly "reject[ed] . . . a limited interpretation of *Mancari*" such as the one now adopted by the panel majority below. *Alaska Chapter, Associated General Contractors of America, Inc. v. Pierce*, 694 F.2d 1162, 1168 (9th Cir. 1982) (reversing a district court holding "that *Mancari* was limited to functions designed to further Indian self-government," *id.* at 1167). Instead, the court concluded that because the preference promoting Native economic self-sufficiency "furthers the government's trust responsibility towards Indians, it does not violate equal protection." *Id.* at 1170. *See also LaPier v. McCormick*, 986 F.2d 303 (9th Cir. 1993); *Barona Group of Capitan Grande Band of Mission Indians v. American Management & Amusement, Inc.*, 840 F.2d 1394, 1406-07 (9th Cir.), *cert. dismissed*, 487 U.S. 1247 (1988).

The panel majority's decision in the instant case is irreconcilable with the prior panel decisions of that court. This appears to be another case in which the Ninth Circuit's unwillingness or inability to employ the *en banc* procedure of FED. R. APP. P. 35 has "introduced uncertainty" among the many courts "within the Court of Appeals' large geographical jurisdiction." *Cf. Pounders v. Watson*, 117 S. Ct. 2359, 2363 (1997) (*per curiam*). Since the majority of the cases calling for application of the *Mancari* doctrine have arisen and now will continue to arise in that Circuit, this case cries out for exercise of the discretion vested by this Court's Rule 10(a).

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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Appendix

FOR PUBLICATION

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

THOMAS E. WILLIAMS; ALASKA REINDEER, INC.; REINDEER HERDERS ASSOCIATION, INC.,
Plaintiffs-Appellants,

v.

BRUCE BABBITT, in his capacity as the United States Secretary of the Interior; CESAR NILES, in his capacity as Juneau Area Director of the United States Bureau of Indian Affairs,
Defendants-Appellees,

KAWERAK REINDEER HERDERS ASSOC.,
Defendant-intervenor-Appellee.

No. 95-35607
D.C. No.
CV-94-00245-JWS
OPINION

Appeal from the United States District Court
for the District of Alaska
John W. Sedwick, District Judge, Presiding

Argued and Submitted
August 8, 1996—Anchorage, Alaska

Filed May 28, 1997

Before: Alfred T. Goodwin, Melvin Brunetti and
Alex Kozinski, Circuit Judges.

Opinion by Judge Kozinski;
Concurrence by Judge Brunetti

SUMMARY

Government Law/Native Americans

The court of appeals reversed a judgment of the district court and remanded. The court held that the Reindeer Act of 1937 (Act) does not prohibit non-natives in Alaska from owning, importing, or selling reindeer.

In order to preserve the "native character" of the reindeer industry, Congress passed the Act, which permitted the government to buy all reindeer owned by non-natives in Alaska and give them to the natives. The Act also strictly limits the sale of reindeer to non-natives.

In 1986, appellant Thomas Williams informed the Bureau of Indian Affairs (BIA) Area Director in Alaska that he intended to import reindeer from Canada for commercial purposes and wanted to know whether this would violate the Act. The Area Director referred the inquiry to the Regional Solicitor's Office. The Solicitor noted that nothing in the Act specifically prohibits non-natives from owning and selling reindeer. The Act's prohibitions on selling reindeer to non-natives apply only to those owned by the government and those owned by natives. Therefore, the Solicitor held that these restrictions did not apply to Williams's imported Canadian reindeer and that Williams was free to sell his reindeer to anyone. Native reindeer herders appealed this decision to the Interior Board of Indian Appeals (IBIA).

The IBIA acknowledged that the Act is silent about non-native ownership of reindeer. However, it held that, based on the Act's policy, structure and legislative history, the statute must be construed to prohibit non-native entry into the reindeer industry regardless of the source of the reindeer involved. The district court upheld the IBIA's interpretation. Williams and other non-native reindeer herders appealed.

Williams contended that the IBIA's interpretation violates the constitutional guarantee of equal protection. Williams made two arguments. First, that the IBIA's interpretation could not be upheld even under the pro-native standard of *Morton v. Mancari*, 417 U.S. 535 (1974). Secondly, that *Mancari* was overruled by *Adarand Constructors, Inc. v. Pena*, 115 S.Ct. 2097 (1995), and IBIA's interpretation could not survive *Adarand's* strict scrutiny.

[1] The IBIA's interpretation is owed substantial deference and a statute favoring Native Americans must be construed liberally in their favor. On the other hand, Williams claimed that the Act, as interpreted by IBIA, violates the constitutional guarantee of equal protection of the laws.

[2] The Ninth Circuit has concluded that a court is bound to defer to an agency's interpretation except where the interpretation raises difficult constitutional questions. [3] Whether the IBIA's interpretation was entitled to deference turned on the seriousness of the constitutional doubts it raised.

[4] In *Mancari*, the Supreme court rejected an equal protection challenge to a statutory hiring preference for Indians in the BIA. The Court held that statutory preferences for Indians were "political not racial" classifications and would be upheld as long as the special treatment can be tied rationally to the fulfillment of Congress's unique obligation toward the Indians. [5] The preference at issue in *Mancari* only applied to the BIA, an agency created for the purpose of serving Indians. According to the IBIA, the Act provides a preference in an industry that is not uniquely native. The Act in no way relates to native land, tribal or communal status, or culture.

[6] Legislation that relates to Indian land, tribal status, self-government, or culture passes *Mancari's* rational relation test because such regulation is rooted in the unique status of Indians as a separate people with their own political institutions. As a separate people, Indians have a right to expect some spe-

cial protection for their land, political institutions, and culture. [7] While *Mancari* is not necessarily limited to statutes that give special treatment to Indian land, it is read as shielding only those statutes that affect uniquely Indian interests. The present case did not involve matters of tribal self-regulation, but the federal regulation of criminal conduct within Indian country implicating Indian interests.

[8] The Supreme Court's decision in *Adarand* added to the constitutional doubts about the IBIA's interpretation of the Act. In *Adarand*, the Court ruled that racial classifications by the federal government are subject to strict scrutiny. [9] Under strict scrutiny, the IBIA's interpretation would almost certainly render the Act unconstitutional. Assuming that Congress has a compelling interest in assisting natives economically, the IBIA's interpretation precludes any chance of defending the Act as narrowly tailored to serve that interest. A complete race-based ban is the broadest possible remedy. Unlike a subsidy, set-aside, or even a quota, an absolute ban deprives the disfavored racial group of all opportunity to participate, thus placing a tremendous burden on innocent third parties. This makes the remedy almost by definition not narrowly tailored. Additionally, a race-conscious remedy will not be deemed narrowly tailored until less sweeping alternatives, particularly race neutral ones, have been considered and tried.

[10] The constitutional questions raised by the IBIA's interpretation were grave. However, there was no reason to unnecessarily resolve them when a less constitutionally troubling construction was available. [11] Therefore, although the Act erects a number of barriers to non-native participation in the reindeer industry, it does not prohibit non-natives in Alaska from owning, importing, or selling reindeer.

Judge Brunetti concurred, writing that because the plain language of the statute did not support the district court's upholding of the IBIA's interpretation of the statute, it was

not necessary to resort to legislative history to determine the propriety of that interpretation or resolve constitutional questions posed by the same.

COUNSEL

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Edward J. Shawaker, Sylvia F. Liu, Judith Rabinowitz, Environment & Natural Resources Division, United States Department of Justice, Washington, D.C., for the defendants-appellees.

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OPINION

KOZINSKI, Circuit Judge.

We must decide whether the Reindeer Act of 1937, 25 U.S.C. §§ 500 *et seq.*, prohibits reindeer herding by non-natives in Alaska.

I

Contrary to popular belief, reindeer are neither native to Alaska nor part of the Alaskan native way of life. Around the turn of the century, white settlers had just about exhausted the natural food supply of Alaskan natives, who traditionally

relied on fishing and hunting. Dr. Sheldon Jackson, the famous missionary, realized that raising livestock could provide natives a stable food supply, so he arranged for the importation of reindeer from Russia.[1] *See Alaska Legislation: Hearing on Bills Relating to the Territory of Alaska Before the House Comm. on the Territories*, 75th Cong., 1st Sess. 4-5 (1937) (statement of Rep. Dimond). But white settlers also muscled into the reindeer business, prompting Congress to pass the Reindeer Act of 1937. The Act appropriated $2 million to buy all reindeer owned by non-natives in Alaska and give them to the natives. The Act also strictly limits the sale of reindeer to non-natives.

In 1986, appellant Williams informed the Bureau of Indian Affairs Area Director in Alaska that he intended to import reindeer from Canada for commercial purposes; he asked whether his plan would run afoul of the Reindeer Act. *See Reindeer Herders Ass'n* v. *Juneau Area Dir.*, 23 IBIA 28, 35 (1992). The Area Director referred the inquiry to the Regional Solicitor's Office, which held that it would not. Nothing in the Act, the Solicitor noted, specifically prohibits non-natives from owning and selling reindeer. The Solicitor further noted that the Act's prohibitions on selling reindeer to non-natives apply only to two categories of reindeer: those owned by the government and those owned by natives, *see* 25 U.S.C. § 500i ("Live reindeer in Alaska, and the increase thereof, acquired by the Secretary of the Interior . . ., and live reindeer in Alaska, and the increase thereof, owned by the said natives . . . shall not be sold or transferred . . . to anyone other than . . . natives of Alaska . . . ."). The Regional Solicitor, therefore, held that these restrictions didn't apply to appellants'

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[1]When not pulling sleighs laden with presents from the North Pole, reindeer are slaughtered for their meat—which was very popular in the lower 48 during the 1930s and 1940s but is now mainly consumed in Alaska—and for their antler velvet—which is exported to Asia where it is considered an aphrodisiac. *See* Hugh Beach, *The Reindeer-Caribou Conflict in the Nana Region of Alaska: A Case Study for Native Minority Rights Issues* at 5.

imported Canadian reindeer and that appellants were free to sell their reindeer to anyone. *See Reindeer Herders Ass'n*, 23 IBIA at 35-37 (quoting the Regional Solicitor's opinion). In 1989, the Regional Solicitor reconsidered the issue and reached the same conclusion. *See id.* at 39-41. The Area Director officially adopted the Regional Solicitor's interpretation, and native reindeer herders appealed to the Interior Board of Indian Appeals (IBIA).

The IBIA acknowledged that the Act says nothing about non-native ownership of reindeer. Nevertheless, it held that, based on the Act's policy, structure and legislative history, the statute "must be construed to prohibit non-Native entry into the reindeer industry in Alaska, regardless of the source of the reindeer involved." *Id.* at 69. The district court upheld the IBIA's interpretation and rejected appellants' claim that the Act violates equal protection. *See* E.R. at tab 9. The non-native reindeer herders appeal.

II

We start, as did the Regional Solicitor, by noting that the Reindeer Act does not by its terms guarantee Alaskan natives a monopoly in the reindeer business. To be sure, a lot there suggests that Congress meant to give natives a big leg up in the business. The Act's declared purpose is to "preserv[e] the native character" of the reindeer industry, 25 U.S.C. § 500, and it authorizes the Secretary of Interior to organize and manage the reindeer industry so that natives have "responsibility . . . in all branches of said industry," *id.* § 500f. To that end, the Act directs the Secretary to buy all reindeer and equipment needed to effectuate the Act's purpose, *id.* § 500a, and imposes a continuing duty on any non-natives who come into possession of reindeer to register them with the Interior Department, *id.* § 500b, presumably so the government can buy the reindeer for the natives. Most significantly, the Act prohibits the sale of government- and native-owned reindeer to non-natives unless the reindeer are to be

slaughtered within 30 days of sale or exported from Alaska "and never brought back alive." *Id.* § 500i.

Taken as a whole, these provisions do place significant obstacles in the way of any non-native who would operate a reindeer business in Alaska. To begin with, as of 1937, the Act ensured that only natives would be established in the industry; a non-native who wanted to get into the business would have had to overcome the advantages of incumbency enjoyed by natives, and suffered the disadvantage of not being allowed to buy local reindeer or any of their offspring. *See* 25 U.S.C. § 500i. At the time the Act was passed, this meant that non-natives would have had to obtain the reindeer from Scandinavia or Russia where they are indigenous. Moreover, non-natives intending to start a reindeer business would have had to buy grazing land, as the government allows only natives to graze reindeer on federal land. *Id.* § 500m; 43 C.F.R. § 4310.2 (1995). This too would have been a huge obstacle because 99% of land in Alaska, until statehood in 1950, was owned by the federal government. *See* Richard O. Stern, et. al, *Eskimos, Reindeer, and Land* 187 (1980). Congress may well have thought that, by passing the Act, it was effectively precluding anyone other than natives from entering the reindeer business. Nevertheless, nothing in the Act actually prohibits non-natives from entering the Reindeer business if they can overcome all these obstacles.[2]

[1] Were we interpreting the statute free from any constraint, therefore, we would conclude that the Reindeer Act does not proscribe appellants' activities. But, as often happens, we must construe the statute subject to a number of

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[2]Congress may have stopped short of actually barring non-natives from the reindeer business because some legislators expressed concern about the constitutionality of such a bar. *See Alaska Legislation*, 75th Cong., 1st Sess. 31 (statement of Rep. Mills); *see id.* at 7 ("It would be unconstitutional for these people to discriminate, to say what type of business one fellow can be in, would it not?").

countervailing considerations. In the first place, we owe the IBIA's interpretation substantial deference. *See Chevron U.S.A.* v. *Natural Res. Def. Council*, 467 U.S. 837, 842-43 (1984).[3] Then too, we are required to construe statutes favoring Native Americans liberally in their favor. *See, e.g., County of Yakima* v. *Confederated Tribes and Bands*, 502 U.S. 251, 269 (1992). Weighing on the other side is appellants' claim that the Reindeer Act, as interpreted by the IBIA, violates the constitutional guarantee of equal protection of the laws.

III

It is a close question whether—even giving the agency the full measure of deference to which it is entitled under *Chevron* and adding in the special solicitude to which that interpretation is entitled because it favors natives—we could uphold the agency's interpretation. The simple fact is that the Act—which is so explicit on so many points—does not say the one thing the agency reads it to say: that non-natives may

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[3]There is no dispute that the IBIA's interpretation of the Reindeer Act is entitled to *Chevron* deference absent other considerations. The Interior Department is charged with administering the Reindeer Act, *see* 25 U.S.C. § 500k ("The Secretary of the Interior is hereby authorized to promulgate such rules and regulations as, in his judgment, are necessary to carry into effect the provisions of this subchapter."), and the IBIA exercises final decisionmaking authority for the Secretary of Interior concerning challenges to administrative actions by Bureau of Indian Affairs (BIA) officials, like the Regional Solicitor and Juneau Area Director. *See* 43 C.F.R. § 4.1(b)(2)(i) (1995).

It makes no difference that the Interior Department's interpretation is embodied in a decision of the IBIA instead of a regulation. A statutory interpretation adopted by an agency in the course of adjudicating a dispute is entitled to *Chevron* deference so long as the agency has the power to make policy in the area. 1 Kenneth Culp Davis, *Administrative Law Treatise* § 3.5, at 120 (1994). The Interior Department is authorized to make policy in the area of Alaska's reindeer industry. *See* 25 U.S.C. § 500f ("The Secretary of the Interior is authorized . . . to organize and manage the reindeer industry . . . .").

not herd reindeer.[4] This is not a minor detail—a mere interstice—that the agency is entitled to fill in at its discretion. Rather, the total and perpetual exclusion of a majority of the population of Alaska from a particular enterprise is the kind of significant feature we would normally expect Congress to spell out if that were its intent. We are aware of no other provision in the Code of Federal Regulations that effectuates quite so sweeping a policy based on such ambiguous statutory language.

At the same time, we recognize that for the past 60 years natives have enjoyed a de facto monopoly in the Alaskan reindeer business. This monopoly has developed under the watchful supervision of the agency charged with enforcing the Reindeer Act and is, therefore, entitled the added force of a long-standing construction. *See Reindeer Herders Ass'n*, 23 IBIA at 34 (noting that, since 1939, the Interior Department and general public "assumed" the Act precluded non-native ownership). Under these circumstances, we conclude that the agency's interpretation of the Reindeer Act, favoring natives as it does, is not unreasonable.

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[4]Our concurring colleague argues that, because Congress was silent on this point, the Act is not ambiguous and thus we need not defer to the IBIA's interpretation. This cannot be squared with *Chevron*'s clear command: "[I]f the statute is silent *or* ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute." 467 U.S. at 843 (emphasis added); *see, e.g., Jang* v. *Reno*, No. 96-15593, slip op. 5613, 5619 (9th Cir. May 14, 1997) ("Concluding that the statutory language evidenced no specific congressional intent on the precise issue in dispute, we move on to step two of the *Chevron* analysis."); *Yang* v. *INS*, 79 F.3d 932, 935 (9th Cir.) ("In the face of ambiguity or Congressional silence, we should defer to the agency's considered judgment."), *cert. denied*, 117 S. Ct. 83 (1996). Were Judge Brunetti's view correct, agencies would be precluded from ever filling in a gap in a statute, which would radically curtail the power of executive agencies and gut *Chevron*.

IV

This only brings us to a far more complex question: To what extent is a court bound to defer to an agency's interpretation where that interpretation raises difficult constitutional questions? The Supreme Court has spoken twice on this subject. In *DeBartolo Corp.* v. *Florida Gulf Coast Trades Council*, 485 U.S. 568 (1988), the Court rejected the NLRB's interpretation of section 8(b)(4) of the National Labor Relations Act, 29 U.S.C. § 158(b)(4), that would have prohibited certain handbilling by unions. *See* 485 U.S. at 588. Although the NLRB was entitled to *Chevron* deference, *id.* at 574, the Court refused to defer to the NLRB because its interpretation raised serious First Amendment questions.

The Court reached a different conclusion in *Rust* v. *Sullivan*, 500 U.S. 173 (1991). At issue there were Department of Health and Human Services regulations issued pursuant to Title X of the Public Health Service Act, 42 U.S.C. §§ 300 to 300a-6, that prohibited federally funded family planning clinics from providing abortion counseling. Although the regulations were challenged on constitutional grounds, the Court applied *Chevron*, upholding the regulations as a reasonable interpretation of an ambiguous statute, and proceeded to address the constitutional question on the merits. 500 U.S. at 191-92.

We do not read *Rust* as overruling *Debartolo*. Rather, the *Rust* majority simply did not find the constitutional doubts raised by the regulations to be "grave and doubtful" enough to defeat the presumption of *Chevron* deference. 500 U.S. at 191. As Professor Davis has noted, "All nine Justices [in *Rust*] agreed that 'a statute must be construed, if fairly possible, to avoid not only the conclusion that it is unconstitutional but also grave doubts on that score.' The Justices divided 5 to 4, however, on the issue of whether the agency's construction . . . raised 'the sort of grave and doubtful constitutional questions . . . that would lead us to assume that Congress did not

intend to authorize' the construction announced in the agency rule." 1 Davis, *Administrative Law* § 3.6, at 129 (quoting *Rust*, 500 U.S. at 190-91) (citations omitted). Equally important, the *Rust* majority noted that applying *Debartolo* would effectively eliminate *Chevron* deference for all regulations touching on abortion. *See* 500 U.S. at 191 ("The extensive litigation regarding governmental restrictions on abortion since our decision in *Roe* v. *Wade*, 410 U.S. 113 (1973), suggests that it was likely that any set of regulations promulgated by the Secretary . . . would be challenged on constitutional grounds.").

[2] *Rust* and *DeBartolo*, read together, require courts to scrutinize constitutional objections to a particular agency interpretation skeptically. Only if the agency's proffered interpretation raises *serious* constitutional concerns may a court refuse to defer under *Chevron*. This is the approach taken by one of our sister circuits. *Compare Chamber of Commerce* v. *Federal Elections Comm'n*, 69 F.3d 600, 605 (D.C. Cir. 1995) (declining to accord *Chevron* deference to a Federal Election Commission regulation because it would raise troubling constitutional questions) *with Republican Nat'l Comm.* v. *Federal Election Comm'n*, 76 F.3d 400, 409 (D.C. Cir. 1996) (according *Chevron* deference because "we can easily resolve the [constitutional questions] through the application of controlling precedent"), *cert. denied*, 1997 WL 2652 (1997).

This reading of *DeBartolo* and *Rust* does not offend *Chevron*'s underlying principles and preserves the balance of power between the judicial and the political branches. First, an agency is entitled to *Chevron* deference largely because Congress has delegated interpretive authority to it. *See Pauley* v. *Bethenergy Mines*, 501 U.S. 680, 696 (1991). But, just as we will not infer from an ambiguous statute that Congress meant to encroach on constitutional boundaries, we will not presume from ambiguous language that Congress intended to authorize an agency to do so. At the core of *DeBartolo* lies

the presumption that, if Congress means to push the constitutional envelope, it must do so explicitly. *See* 485 U.S. at 575.

Second, an agency's interpretation is generally accorded *Chevron* deference because the agency has superior expertise in the particular area. When agencies adopt a constitutionally troubling interpretation, however, we can be confident that they not only lacked the expertise to evaluate the constitutional problems, but probably didn't consider them at all. *See, e.g., Gilbert* v. *NTSB*, 80 F.3d 364, 366-67 (9th Cir. 1996) ("Generally, challenges to the constitutionality of a statute or a regulation promulgated by an agency are beyond the power or jurisdiction of an agency."). That was the case here, as the IBIA declared itself unable to address the constitutional arguments raised against its interpretation. *Reindeer Herders Assn.*, 23 IBIA at 48. Judges, by contrast, specialize in "say[ing] what the law is." *Marbury* v. *Madison*, 5 U.S. (1 Cranch) 137, 176 (1803). The balance of expertise therefore shifts against judicial deference to agency interpretations when a constitutional line is about to be crossed. *See The Supreme Court, 1990 Term—Leading Cases*, 105 Harv. L. Rev. 177, 398 (1991) ("When constitutional rights are implicated . . ., the balance of values clearly shifts against agency deference.").

Third, the *DeBartolo* rule doesn't usurp the policymaking powers of the political branches. When courts attempt to give meaning to a hopelessly ambiguous statute using tools of statutory interpretation, they often do engage in camouflaged policymaking. *See* 1 Davis, *Administrative Law* § 3.6, at 130 ("It is the very indeterminacy of the 'traditional tools' that gives judges the discretion to make policy decisions through the process of statutory construction."). But when a court construes a statute so as to avoid a difficult constitutional question, it is not making a policy choice; rather, it is practicing constitutional narrowing. *See United States* v. *X-Citement Video*, 982 F.2d 1285, 1295 n.6 (9th Cir. 1992) (Kozinski, J., dissenting in part) ("Statutory interpretation is an attempt to

divine the meaning of the statute as [enacted]. Constitutional narrowing seeks to add a constraint to the statute that its drafters plainly had not meant to put there."). The agency remains free to adopt any interpretation that doesn't come perilously close to the constitutional boundary. And, of course, Congress may still force the issue by removing the statutory ambiguity and making it clear that it chooses the constitutionally doubtful interpretation—in which event, the courts will have to confront the constitutional question squarely.

To be sure, *DeBartolo* does constrain agency power by precluding some policy options because they raise serious constitutional questions, even though they may ultimately turn out to be constitutional. *Cf.* William N. Eskridge, Jr. & Phillip P. Frickey, *The Supreme Court 1993 Term, Forword: Law As Equilibrium,* 108 Harv. L. Rev. 26, 85 (1994) (constitutional narrowing creates the possibility of "stealth constitutionalism" by which judges enforce constitutional norms without having to actually articulate them); Richard A. Posner, *Statutory Interpretation—in the Classroom and in the Courtroom,* 50 U. Chi. L. Rev. 800, 816 (1983) (the canon allows the creation of "a judge-made constitutional 'penumbra' "). *Rust,* however, limits this intrusion on agency power to situations where it's absolutely necessary. According to *Rust,* constitutional narrowing should displace *Chevron* only when the constitutional problems are truly "grave" and never when it would effectively preclude all policy options because all possible interpretations raise constitutional problems.

[3] Whether the IBIA's interpretation here is entitled to *Chevron* deference therefore turns on the seriousness of the constitutional doubts it raises.[5]

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[5]The IBIA's interpretation gains little extra weight from the rule that statutes must be construed liberally in favor of natives. While at least one of our sister circuits regards this liberal construction rule as a substantive principle of law, *see Albuquerque Indian Rights* v. *Lujan,* 930 F.2d 49, 59

V

Appellants claim that the Reindeer Act, as construed by the IBIA, violates equal protection; they make two arguments. First, they contend that the IBIA's interpretation can't be upheld even under the pro-native standard of *Morton* v. *Mancari*, 417 U.S. 535 (1974). In any event, they argue, *Mancari* was overruled by *Adarand Constructors, Inc.* v. *Pena*, 115 S. Ct. 2097 (1995), and the IBIA's interpretation cannot possibly survive *Adarand*'s strict scrutiny.

[4] In *Mancari*, the Supreme Court rejected an equal protection challenge to a statutory hiring preference for Indians in the Bureau of Indian Affairs (BIA). The Court held that statutory preferences for Indians were "political" not "racial" classifications, 417 U.S. at 553 n.24, and would be upheld "[a]s long as the special treatment can be tied rationally to the fulfillment of Congress' unique obligation toward the Indians . . . ." *Id.* at 555. Although the Court has never overturned a statute or treaty affecting Indians or natives since *Mancari*, *see* Stuart Minor Benjamin, *Equal Protection and the Special Relationship: The Case of Native Hawaiians*, 106 Yale L.J. 537, 548 (1996); Felix S. Cohen, *Handbook of Federal Indian Law* 657 (2d ed. 1982), the IBIA's interpretation makes the Reindeer Act very different from a lot of other legislation pertaining to Native Americans.

(D.C. Cir. 1991) ("[T]he liberality rule . . . involving native Americans derives from principles of equitable obligations and normative rules of behavior, rather than from ordinary statutory exegesis."), we regard it as a mere "guideline and not a substantive law." *Shields* v. *United States*, 698 F.2d 987, 990 (9th Cir. 1983); *see also Montana* v. *Blackfeet Tribe*, 471 U.S. 759, 770 (White, J., dissenting) ("this rule is no more than a canon of construction"). We have therefore held that the liberal construction rule must give way to agency interpretations that deserve *Chevron* deference because *Chevron* is a substantive rule of law. *See, e.g., Haynes* v. *United States*, 891 F.2d 235, 239 (9th Cir. 1989); *Shields*, 698 F.2d at 991. As a result, if the IBIA's interpretation does not prevail despite *Chevron*'s help, the less powerful liberal construction guideline will not save the day.

[5] The preference at issue in *Mancari* only applied to the BIA, an agency created for the purpose of serving Indians. In approving the preference, the Court noted that "a blanket exemption for Indians from all civil service examinations" would pose an "obviously more difficult question." *See* 417 U.S. at 554. While *Mancari* did not have to confront the question of a naked preference for Indians unrelated to unique Indian concerns, the IBIA's interpretation of the Reindeer Act would force us to confront that very issue. According to the IBIA, the Reindeer Act provides a preference in an industry that is not uniquely native, whether the beneficiaries live in a remote native village on the Seward Peninsula or in downtown Anchorage. The Act in no way relates to native land, tribal or communal status, or culture.

The government, intervenors and amici have been unable to cite another law that gives natives so broad a preference.[6]

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[6]The government and amici cite over two dozen statutes that single out Indians for special treatment in the distribution of government benefits and programs; all relate to Indian land, tribal status, self-government, or culture. *See, e.g.*, 7 U.S.C. § 5930 (education programs on Indian land); 12 U.S.C. §§ 4702(11), (16), (20) (community development banks on reservations and tribal lands); 16 U.S.C. § 668a (exception to prohibition on possession of eagle feathers for Indian religious purposes); 16 U.S.C. §§ 1721, 1723, 1729(a)(1) (conservation projects on Indian lands); 20 U.S.C. § 1106b(c)(7) (special consideration to teacher corps participants who teach on Indian reservations and in Alaska Native villages); 25 U.S.C. § 194 (favorable presumption for Indians in title disputes involving Indian land); 25 U.S.C. §§ 1452(c),(d), 1466, 1495 (loan assistance for purchase of Indian land); 25 U.S.C. § 1644(a) (health care grants for programs "on or near" Indian lands); 25 U.S.C. § 2402(1) (prevention of drug traffic in "Indian country" and alcoholism that affects tribes); 25 U.S.C. § 3112 (assistance in management of forests on native land); 25 U.S.C. §§ 3202(9), 3208 (child abuse prevention programs on reservations); 25 U.S.C. §§ 3702, 3703(10) (assistance in management of "Indian agricultural lands"); 26 U.S.C. §§ 38(a)(10), 45A (employment credit for wages paid to workers on native land); 26 U.S.C. § 164(j) (accelerated depreciation schedule for property on Indian reservations); 26 U.S.C. § 4225 (tax exemption for "native Indian handicraft"); 29 U.S.C. §§ 1784, 1784b(1) (reservations and native villages eligible for disaster relief); 42 U.S.C.

They point out that Congress has exempted Alaskan natives from certain prohibitions against hunting and fishing.[7] Unlike raising livestock, however, hunting and fishing wild game is an integral and time-honored part of native subsistence culture, *see* David S. Case, *Alaska Natives and American Laws* 276 (1984) (subsistence hunting and fishing "are intricately woven into the fabric of [native] social, psychological, and religious life"), and all of these exemptions only permit taking of animals for subsistence or cultural uses. *See* 16 U.S.C. §§ 712(1), 1153, 1371(b), 1539(e).

[6] Legislation that relates to Indian land, tribal status, self-government or culture passes *Mancari*'s rational relation test because "such regulation is rooted in the unique status of Indians as 'a separate people' with their own political institutions." *United States* v. *Antelope*, 430 U.S. 641, 646 (1977). As "a separate people," Indians have a right to expect some special protection for their land, political institutions

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§ 682(i) (skills training within native lands); 42 U.S.C. §§ 1437a(b)(9)-(12) (natives on Indian land eligible for low-income housing); 42 U.S.C. §§ 1471(a), (b)(6) (native villages eligible for financial assistance for farm housing); 42 U.S.C. §§ 3002(6) & (7), 3022(2)(B), 3057, 3058aa (native villages eligible to receive benefits for distribution to elderly natives); 42 U.S.C. §§ 3796gg, 3796gg-2(3) (native village eligible for programs to prevent violence against women); 42 U.S.C. § 4368b(c) (tribes and native villages eligible to receive EPA grants); 42 U.S.C. §§ 5302(a)(17), 5306 (native villages eligible for HUD grants); 42 U.S.C. §§ 6702, 6707(a)(1), (h)(2)(B) (public works set asides for native villages and tribes); 42 U.S.C. §§ 6722, 6723(c)(3)(D)(ii) (native entities eligible for financial assistance to stimulate economic recovery); 42 U.S.C. § 8802(12) (assistance to tribes to develop biomass energy and alcohol fuels); 42 U.S.C. § 11472 (job training set asides for tribes); 42 U.S.C. § 13791 (tribes eligible for funds to support community youth services); 42 U.S.C. §§ 13801, 13861, 13868, 13971, 14151 (tribes eligible for special grants from Attorney General).

[7] *E.g.*, 16 U.S.C. § 712(1) (migratory birds); 16 U.S.C. § 1153 (fur seals); 16 U.S.C. § 1371(b) (whales); 16 U.S.C. §§ 1531, 1539(e) (endangered species).

(whether tribes or native villages), and culture. We therefore have upheld statutes that provide Indians with special fishing rights that were promised to them by treaty, *United States* v. *Decker*, 600 F.2d 733, 740-41 (9th Cir. 1979), and subsidies for "low-income housing in remote Alaskan villages," *Alaska Chapter, Assoc. Gen. Contr.* v. *Pierce*, 694 F.2d 1162, 1163 (9th Cir. 1982).

As in *Alaska Chapter*, *id.* at 1167, we can discern *Mancari*'s scope by looking to the cases it cited as examples of permissible special treatment for Indians, *see* 417 U.S. at 555: Each case dealt with life in the immediate vicinity of Indian land. *E.g.*, *Morton* v. *Ruiz*, 415 U.S. 199 (1974) (providing welfare benefits to Indians, but only those who live "on or near" reservations); *McClanahan* v. *Arizona State Tax Comm'n*, 411 U.S. 164 (1973) (tax exemption for income derived wholly from reservation sources); *Simmons* v. *Eagle Seelatsee*, 384 U.S. 209 (1966), *aff'g* 244 F. Supp. 808 (E.D. Wash. 1965) (limiting the right to inherit reservation land only to Indians); *Williams* v. *Lee*, 358 U.S. 217 (1959) (tribal courts and their jurisdiction over reservation affairs).

[7] While *Mancari* is not necessarily limited to statutes that give special treatment to Indians on Indian land, we do read it as shielding only those statutes that affect uniquely Indian interests. *See, e.g.*, *Antelope*, 430 U.S. at 646 ("Both *Mancari* and *Fisher*[v. *District Court*, 424 U.S. 382 (1976),] involved preferences or disabilities directly promoting Indian interests in self-government, whereas in the present case we are dealing, not with matters of tribal self-regulation, but with federal regulation of criminal *conduct within Indian country implicating Indian interests*." (emphasis added)). For example, we seriously doubt that Congress could give Indians a complete monopoly on the casino industry or on Space Shuttle contracts. At oral argument, counsel for the government conceded that granting natives a monopoly on all Space Shuttle contracts would not pass *Mancari*'s rational-relation test. Counsel could only distinguish the Space Shuttle preference from a

reindeer preference by noting that, in 1937, natives were heavily involved in the reindeer business whereas they aren't involved in the Space Program. The casino example defies this distinction, but is equally unrelated to "Congress' unique obligation toward the Indians." *Mancari*, 417 U.S. at 555.

[8] The Supreme Court's recent decision in *Adarand* only adds to our constitutional doubts about the IBIA's interpretation of the Reindeer Act. In *Adarand*, the Court ruled that racial classifications by the federal government are subject to strict scrutiny. The Court overruled *Metro Broadcasting, Inc.* v. *FCC*, 497 U.S. 547 (1990), in part because its application of intermediate scrutiny to federal racial classifications was inconsistent with the strict scrutiny applied to state classifications. *See Adarand*, 115 S. Ct. at 2112. Although the majority emphasized that it was only overruling *Metro Broadcasting*, *id.* at 2116, Justice Stevens in dissent argued that the majority's "concept of 'consistency' [in equal protection jurisprudence] . . . would view the special preferences that the National Government has provided to Native Americans since 1834 as comparable to the official discrimination against African Americans that was prevalent for much of our history." *Id.* at 2121 (Stevens, J., dissenting) (footnote citing *Mancari* omitted). If Justice Stevens is right about the logical implications of *Adarand*, *Mancari*'s days are numbered. *See* Benjamin, 106 Yale L.J. at 567.

[9] Under strict scrutiny, the IBIA's interpretation would almost certainly render the Reindeer Act unconstitutional. Assuming that Congress has a compelling interest in assisting natives economically,[8] the IBIA's interpretation precludes any

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[8]Intervenors claim that subjecting laws favoring Indians to strict scrutiny "would effectively gut Title 25 of the U.S. Code." Intervenor-Defendant-Appellee's Br. at 14. Such a dire prediction, however, is unwarranted. We have little doubt that the government has compelling interests when it comes to dealing with Indians. In fact, *Mancari*'s lenient standard may reflect the Court's instinct that most laws favoring Indians

chance of defending the Reindeer Act as narrowly tailored to serve that interest. A complete race-based ban is the broadest possible remedy. Unlike a subsidy, set-aside or even a quota, an absolute ban deprives the disfavored racial group of all opportunity to participate, thus placing a tremendous burden on innocent third parties. This makes the remedy almost by definition not narrowly tailored. *See, e.g., United States* v. *Paradise*, 480 U.S. 149, 182 (1987) (plurality opinion) (noting that a narrowly tailored employment preference was not "an 'absolute bar' to white advancement"); *Sheet Metal Workers* v. *EEOC*, 478 U.S. 421, 481 (1986) ("While white applicants for union membership may be denied certain benefits available to their nonwhite counterparts, the court's orders do not stand as an absolute bar . . . ."). Moreover, non-natives have been effectively excluded from the reindeer industry for almost 60 years. *See* p. 7-8 *supra*. While a ban on non-native participation in the reindeer industry may have been narrowly tailored in 1937, it may no longer be today. *See Adarand*, 115 S. Ct. at 2118 (a race-conscious program must be "appropriately limited such that it 'will not last longer than the discriminatory effects it is designed to eliminate' " (quoting *Fullilove* v. *Klutznick*, 448 U.S. 448, 513 (1980) (Powell, J. concurring)). This is especially true where the economic and subsistence needs of natives have changed dramatically in the interim—most notably, by passage of the Alaska Native Claims Settlement Act in 1971, which gave natives 44 million acres of land, almost $1 billion, and shares of stock in newly-created native corporations. *See* H.R. Rep. No. 92-523 (1971), *reprinted in*, 1971 U.S.C.C.A.N. 2192, 2193; 43 U.S.C. § 1601 *et seq.* (ANSCA); *Bay View, Inc.* v. *Ahtna, Inc.*, No. 95-35857, slip op. 583, 587 (9th Cir. Jan. 21, 1997).

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serve compelling interests. *See* Cohen, *Handbook of Federal Indian Law* 656 ("[T]he Court's reliance on a political-racial distinction may be no more than an imprecise reference to the special status of Indian tribes under the Constitution and laws."). If so, Title 25 will only be stripped of those laws that are not narrowly tailored.

Finally, a race-conscious remedy will not be deemed narrowly tailored until less sweeping alternatives—particularly race neutral ones—have been considered and tried. *See Associated Gen. Contractors* v. *City & County of S.F.*, 813 F.2d 922, 939 (9th Cir. 1987); *see also Adarand*, 115 S. Ct. at 2118. We note, for example, that Congress recently preserved native subsistence hunting and fishing rights by enacting a race-neutral preference for "rural" Alaskans, regardless of race. *See* Alaska National Interest Lands Conservation Act of 1980 (ANILCA), 16 U.S.C. §§ 3111 *et seq.*; *Village of Gambell* v. *Clark*, 746 F.2d 572, 581 (9th Cir. 1984).

[10] The constitutional questions raised by the IBIA's interpretation are grave and, as intervenors and amici point out, implicate an entire title of the United States Code. We see no reason to unnecessarily resolve them when a less constitutionally troubling construction is readily available. We therefore interpret the Reindeer Act as not precluding non-natives in Alaska from owning and importing reindeer.[9]

* * *

[11] The Reindeer Act erects a number of barriers to non-native participation in the reindeer business, but it does not prohibit non-natives in Alaska from owning, importing or selling reindeer. Congress, of course, is free to adopt the IBIA's interpretation of the Reindeer Act, in which case we would be required to confront explicitly the difficult constitutional questions outlined above. Meanwhile, the decision of the district court is **REVERSED** and the case is remanded for proceedings consistent with this opinion.

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[9]We do not suggest that, once stripped of the ban on non-native ownership, the Reindeer Act will be immune from further constitutional scrutiny. The significant restraints that the text of the Act clearly places on non-native participation in the reindeer industry, *see* pp. 6155-57 *supra*, may also raise constitutional questions. But we do not face those questions here because appellants have challenged only the ban on non-native ownership.

BRUNETTI, Circuit Judge, concurring separately:

Although I agree with the result reached by the majority opinion, I cannot concur in the majority's method of resolving this case. Because the plain language of the statute does not support the district court's upholding of the IBIA's interpretation of the statute, it is not necessary to resort to legislative history to determine the propriety of that interpretation or to resolve constitutional questions posed by the same.

As the majority opinion notes, the Reindeer Act "does not by its terms guarantee Alaskan natives a monopoly in the reindeer business." That is the beginning and, I believe, ought to be the end of our analysis. Nothing in the Act prohibits Appellants from purchasing and importing non-native or government-owned reindeer to Alaska. "When the words of a statute are unambiguous, then, this first canon is also the last: 'judicial inquiry is complete.' " *Connecticut Nat'l Bank v. Germain*, 503 U.S. 249, 254 (1992), citing *Rubin v. United States*, 449 U.S. 424, 430 (1981). Attempting to divine congressional intent from the structure of the Act is both improper and unnecessary in this case.

We ought to look no further than the language of the Reindeer Act to divine Congress' intent. In *Connecticut Nat'l Bank*, the Supreme Court was interpreting the meaning of 28 U.S.C. § 1292, which provides for review in the courts of appeals of "[i]nterlocutory orders of the district courts." *Id.* at 251. The Court addressed whether § 1292 provides for jurisdiction over an interlocutory order of a district court acting in its capacity as a bankruptcy court of appeals. *Id.* Appellees argued that § 1292 was limited through 28 U.S.C. § 158(d) which provides for jurisdiction over appeals from final judgments and orders from the district courts. 28 U.S.C. § 158(d). The Court declined to interpret § 158(d)'s silence with regard to interlocutory orders as a meaningful ambiguity. Instead, the Court focused on the plain language of § 1292 and held that "[s]o long as a party to a proceeding or case in bankruptcy

meets the conditions imposed by § 1292, a court of appeals may rely on that statute as a basis for jurisdiction." *Id.* at 254. Similarly, as long as Appellant does not fall within the prohibition of § 500i of the Reindeer Act, he may do as he pleases.

Section 500i of the Act states, in pertinent part, that "[l]ive reindeer in Alaska, and the increase thereof, acquired by the Secretary of the Interior . . . , and live reindeer in Alaska, and the increase thereof, owned by the said natives, . . . however acquired, shall not be sold or transferred . . . to anyone other than . . . natives of Alaska . . . ." 25 U.S.C. § 500i. The Act refers specifically only to those "reindeer *in Alaska*" and their increase, that are acquired by the Secretary or owned by native Alaskans. 25 U.S.C. § 500i (emphasis added). Appellant, a non-native, seeks to purchase reindeer outside of Alaska from a non-native other than the Secretary and import them to Alaska. Nothing in the language of the Act prohibits Appellant's actions.[1]

Because there is no ambiguity in the Reindeer Act, the district court erred in upholding the IBIA's decision which resorted to legislative history to interpret the Act. "[I]n interpreting a statute a court should always turn to one cardinal canon before all others . . . . [C]ourts must presume that a legislature says in a statute what it means and means in a statute what it says there." *In re Transcon Lines*, 85 F.3d 1432, 1437 (9th Cir. 1995), quoting *Connecticut Nat'l Bank*, 503 U.S. at 253. The IBIA and the district court ignored this canon in interpreting section 500i. The IBIA found that an ambiguity

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[1]Consistent with the *expressio unius* canon of statutory construction, the Act's reference only to those reindeer located in Alaska excludes from its reach those reindeer that are not located in Alaska. Similarly, the Act's reference only to those reindeer owned by either the Secretary or native Alaskans excludes from its reach reindeer owned by a non-native other than the Secretary. "When a statute limits a thing to be done in a particular mode, it includes a negative of any other mode." *Raleigh & Gaston Ty. Co. v. Reid*, 80 U.S. (13 Wall.) 269, 270, 20 L. Ed. 570 (1871), cited in *Longview Fibre Co. v. Rasmussen*, 980 F.2d 1307 (9th Cir. 1992).

in the Act resulted from the fact that "there is neither a specific prohibition of, nor a specific allowance of, importation of foreign reindeer for commercial purposes." 23 IBIA at 67. This approach ignores the use of specific language by Congress in drafting section 500i. We ought not assume that Congress referred to only those "live reindeer in Alaska" accidentally; nor that its reference to only those reindeer owned by the Secretary or native Alaskans was accidental. Before a court or an agency assumes an ambiguity in a statute, it ought to grant the words chosen by Congress their full meaning. The plain language of § 500i is clear; it simply does not prohibit non-native ownership of reindeer in the manner proposed by Appellant. Certainly, the statute places severe obstacles in the way of any non-native, such as Appellant, who might wish to enter the reindeer industry in Alaska. Nothing in the Act suggests however that Congress intended the Act to be a complete barrier to such ownership.

Whatever Congress' intent in enacting the Reindeer Act, "it is inappropriate for a court to invoke the 'broad purpose' of a statute to invalidate specific provisions." *In re Transcon Lines*, 58 F.3d at 1437. In *Transcon*, this court determined that the plain language of the Rates Act must govern despite the fact that the application of the section at issue did not necessarily further the underlying purpose for which the statute was enacted. *Id.* As the Supreme Court has explained:

> Application of 'broad purposes' of legislation at the expense of specific provisions ignores the complexity of the legislative problems Congress is called upon to address and the dynamics of legislative action. Congress may be unanimous in its intent to stamp out some vague social or economic evil; however, because its Members may differ sharply on the means for effectuating that intent, the final language of the legislation may reflect hard-fought compromises. Invocation of the 'plain purposes' of legislation at the expense of the terms of the statute itself

> takes no account of the processes of compromise and, in the end, prevents the effectuation of congressional intent.

Id., quoting *Board of Governors of the Federal Reserve System v. Dimension Financial Corp.*, 474 U.S. 361, 373-74, 106 S.Ct. 681, 688-89, 88 L.Ed.2d 691 (1986).

In interpreting section 500i of the Reindeer Act, the IBIA was guided by its determination of the Act's "broad purpose." Despite the IBIA's conclusion that "no provision in the Reindeer Act explicitly prohibits the importation of reindeer into Alaska or explicitly precludes a non-Native from entering the reindeer business, using imported reindeer," it rejected that interpretation because, although based in the plain language of the statute, it was "clearly adverse to the interests of the Natives for whose benefit the statute was enacted." 23 IBIA 28, 51. Thus, the IBIA improperly invoked the broad purpose of the Reindeer Act at the expense of the Act's plain language in concluding that Appellant's actions were prohibited. Similarly, in upholding the IBIA's decision, the district court focused upon the fact that "when read as a whole, the statute clearly evidences a plan by Congress to provide that there would be a Reindeer industry in Alaska that would be exclusively Native." Under *Transcon*, courts must apply the plain language of statutory provisions despite their assessment that those provisions might be inconsistent with the broad purpose of the statute. The district court and the IBIA erred in failing to follow the plain language of section 500i at the expense of the Act's "broad purpose."

Finally, although we are required to construe statutes favoring Native Americans liberally in their favor, nothing in the Reindeer Act requires that we "construe" the Act at all. *County of Yakima v. Confederated Tribes and Bands*, 502 U.S. 251, 269 (1992). The Act is not ambiguous. We need and ought not defer to an agency's interpretation where that interpretation is contrary to the plain language of the statute.

Sierra Club v. United States Forest Serv., 93 F.3d 610, 612 (9th Cir. 1996) ("Only if the language is ambiguous do we consider statutory history or agency interpretations."). *See also Chevron U.S.A. v. Natural Resources Defense Council*, 467 U.S. 837, 842-43 (1984) ("If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress.") (footnote omitted). Because the IBIA's interpretation of the Act, and the district court's upholding of that interpretation, were contrary to the plain language of the Act, there is no need to address "the far more complex question" of "[t]o what extent is a court bound to defer to an agency's interpretation where that interpretation raises difficult constitutional questions?" I would reverse the district court's decision on the ground that it was contrary to the plain language of the statute.

UNITED STATES DISTRICT COURT
DISTRICT OF ALASKA

Case No. A94-0245-CV (JWS)
Anchorage, Alaska

Wednesday, April 26, 1995
8:15 A.M.

HEARING RE ORAL ARGUMENT ON PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT (DKT 20); FEDERAL DEFENDANTS' CROSS-MOTION FOR SUMMARY JUDGMENT (DKT 24); and KAWERAK'S CROSS-MOTION FOR SUMMARY JUDGMENT (DKT 23).

THOMAS E. WILLIAMS, et al.,
Plaintiffs,

v.

BRUCE BABBITT, NILES CESAR and KAWERAK REINDEER HERDERS,
Defendants.

TRANSCRIPT OF PROCEEDINGS
BEFORE THE HONORABLE JOHN W. SEDWICK
UNITED STATES DISTRICT JUDGE

* * * *

[62] THE COURT: Thank you, Mr. Featherly.

Well, as I said at the outset or at least during the comments, this case has been very thoroughly briefed. I think it's been very well briefed, I think it's been very vigorously argued, and I think the parties are entitled to a decision from

me which I will make quite succinct, and I will do that for a couple of reasons.

First, it's evident to me that this case raises issues that ultimately must be decided by the 9th Circuit. Whatever I have to add to this is better delivered quickly than at length.

[63] In many instances, the briefing and the arguments I received from the parties disclosed that one side or another has misperceived what its issues are, what its arguments are, and it's very important that the trial Court provide a lengthy and reasoned and written opinion, which as those of you who are practitioners before the bar of this Court know I ordinarily do.

Here, it's perfectly evident to me that there are three very competent lawyers who have really done their homework and who have presented the issues to me and will present them to the Circuit Court in such a way that what I could add to the debate really isn't worth much, so I will not prepare the lengthy written opinion that I ordinarily would.

I might also add that both the solicitor's opinion, which is quoted at length in the decision by the IBIA, as well as the IBIA opinion are both very thorough, very well thought out, they're very considered statements concerning the issues that must be resolved in this case.

I find that no material facts are in dispute.

Stated succinctly, the relevant facts are that in December 1986, Williams asked the Juneau area director of the Bureau of Indian Affairs if the Reindeer Act limited herding of Canadian reindeer brought into Alaska by non-Natives. The area director referred the question to the [64] regional solicitor, who advised that the Reindeer Act did not prohibit

non-Natives from importing and herding Canadian reindeer in Alaska.

Subsequently, Mr. Williams' company imported Canadian reindeer and commenced herding in Alaska on privately-owned lands.

An unincorporated association of Native reindeer herders, using the name Reindeer Herders Association, challenged the regional solicitor's interpretation of the Reindeer Act in proceedings which culminated in the decision by the Interior Board of Indian Affairs which, as the parties know, is reported at 23 IBIA, page 30.

There is very complete recitation of the factual details included in the decision by the IBIA; it'll be found at pages 30 through 43, and which is also in the record at Volume 2, pages 200 to 213. I don't think it's necessary for me to add anything to the statement of facts.

Perhaps the first issue that must be addressed is the scope of review with respect to the interpretation of the Reindeer Industry Act.

I find that the Reindeer Industry Act is a statute that was given to the Department of Interior for administration, and that while it is a close question because of the very matters I pointed out in my colloquy with Mr. Featherly and later with Ms. Rabinowitz, I think that the [65] decision is entitled to deference because it does represent the decision of the Secretary since he has adopted the IBIA decision, interpreting a statute that has, since its inception, been given over to the agency for administration.

I do not think that I can, consistent with decisions like *Amtrack v. Boston & Main Corporation*, reported at 118 L.Ed. 2nd 52, or *Chevron U.S.A. v. Natural Resources*

Defense Council, 467 U.S. 837, hold otherwise. Thus, I must decide whether the interpretation of the statute is arbitrary, capricious, unreasonable or violative of law.

I don't think that it is. I think that some very imaginative and some very sincerely held arguments have been made with respect to why the interpretation is improper. There may even be some newer Supreme Court jurisprudence on the plain meaning of statutes that the parties haven't, really haven't dealt with much that has some bearing upon the interpretation.

But I agree with the IBIA to the extent that it has found that Congress' purpose and intent can be found in Section 500, that is, 25 United States Code Section 500, and that when read as a whole, the statute clearly evidences a plan by Congress to provide that there would be a Reindeer industry in Alaska that would be exclusively Native.

To me, it's not possible to read the statute, and [66] particularly to read it against all of the legislative history, not just bits and pieces that Mr. Featherly has displayed on his cards here today, but all of the legislative history which is fairly voluminous, and come to any other conclusion.

The constitutional challenges which have so ably been mounted here by Mr. Williams and his counsel, I think fall wide at mark because the statute is, in my opinion, clearly based on an exercise of Congress' power to regulate commerce with the Indians.

The statute is simply not infected with the virus of racial discrimination. In taking the action that it did, Congress was not setting one race above another, but rather was treating with the original aboriginal sovereigns that it found here in North America when our government was established.

I believe that decisions such *United States vs. Antelope*, 430 U.S. 641, 1977, and the oft-cited *Morton v. Mancari*, show that Congress had the power to treat with these folks in a fashion such that the ordinary equal protection analysis doesn't apply.

I would agree with Mr. Featherly that it's not an unbounded power. I just don't think that Congress stepped across the boundaries here.

I find that the arguments that the Reindeer Act [67] was repealed by the Statehood Act or the Alaska Omnibus Act are not supported by an examination of the relevant law.

The Reindeer Act was not simply a territorial law, nor was its prohibition on importation of reindeer in exercise of territorial law and police powers, but rather, I believe that it was, in its entirety, predicated upon the power of Congress to treat with Indians.

It was a statute that was based upon that power, therefore does not fall short of the constitutional mark under any of the arguments that Mr. Featherly has ably presented.

I don't think *Ward v. Race Horse* really is good law with respect to the propositions for which Mr. Featherly has cited it. I think that the Winters decision, which is the celebrated decision in this area, is more important and dictates the Court's decision in this instance.

So, for all those reasons, I find that the motion for summary judgment by the plaintiffs at Docket 20 must be denied, and the motions for summary judgment by the intervenor at Docket 23 and the federal defendants at Docket 24 must be and hereby are granted.

Let me stress that in providing an oral decision here this morning, I do not denigrate but rather actually the opposite.

The briefing and the effort that has been presented by the parties suggests strongly to me that it's [68] just not necessary for me to write a lengthy decision that would — frankly, I couldn't do much better than — pick better language used by all of you who have written on this subject. Much of what Mr. Featherly has said is very persuasive and needs to be addressed, but then it has been addressed by the defendants.

And so with that, I will assume that the parties will take the matter to the 9th Circuit which will certainly advise me if I have erred.

And is there anything further that we can do this morning? If not, I compliment all counsel on a very well done job. I mean that sincerely. This is perhaps the best argued and briefed case that I've seen in quite some time.

All right. We'll adjourn at this time.

THE CLERK: This matter's adjourned. The Court now stands adjourned subject to call.

(Whereupon, at 10:00 a.m., the hearing in the above-entitled matter was adjourned.)

* * * *

[23 IBIA 28]

United States Department of the Interior

OFFICE OF HEARINGS AND APPEALS

INTERIOR BOARD OF INDIAN APPEALS

4015 Wilson Boulevard

Arlington, Virginia 22203

REINDEER HERDERS ASSOCIATION

v.

JUNEAU AREA DIRECTOR, BUREAU OF INDIAN AFFAIRS

IBIA 92-182-A Decided: November 13, 1992

Appeal from a decision holding that non-Native commercial reindeer operations in Alaska are permissible in certain circumstances under the Reindeer Industry Act of 1937.

Reversed and remanded.

* * * * * *

APPEARANCES: Eric Smith, Esq., Anchorage, Alaska, for appellant; Roger L. Hudson, Esq., Office of the Regional Solicitor, Alaska Region, U.S. Department of the Interior, Anchorage, Alaska, for the Area Director; Thomas E. Williams, pro se.

OPINION BY ADMINISTRATIVE JUDGE VOGT

Appellant Reindeer Herders Association seeks review of a May 27, 1992, decision of the Juneau Area Director, Bureau

of Indian Affairs (Area Director; BIA), which concluded that the Reindeer Industry Act of 1937 (Reindeer Act), 25 U.S.C. §§ 500-500n (1988),[1] does not preclude a person who is not an Alaska Native from importing reindeer into Alaska and engaging in commercial reindeer operations with those imported reindeer and their progeny. For the reasons discussed below, the Board reverses the Area Director's decision and remands this matter to him for further action.

Background

Appellant is an unincorporated association with a membership of 17 Alaska Native reindeer herders, whose 16 herds are located on or near the Seward Peninsula.[2] Appellant states that

> [t]hese herders operate their herds for providing meat to local community members, through outlets in Nome, Kotzebue, Barrow, and Bethel, and to a specialty market of reindeer sausage makers.

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[1] Except where otherwise noted, all further references to the United States Code are to the 1988 edition.

[2] According to R. Stern *et al.*, *Eskimos, Reindeer and Land* at 98 (Univ. of Alaska, 1980), appellant is funded by BIA and was "incorporated in 1971 (formerly the Northwest Alaska Reindeer Herders Association, organized in 1964) through a grant to Kawerak, Inc., the nonprofit social services arm of the Bering Straits Native Corporation."

In 1986, appellant's corporation was involuntarily dissolved by the State of Alaska. Appellant states that it continues as an unincorporated association and a project of Kawerak, Inc.

On Dec. 6, 1991, intervenor Thomas E. Williams was issued a certificate of incorporation by the State of Alaska for a new corporation named "Reindeer Herders Association, Inc." Based on his state certificate of incorporation, Williams challenges appellant's right to continue using the name "Reindeer Herders Association."

Assuming *arguendo* that it has jurisdiction to address this question, the Board declines to do so because the question has no bearing on the issue in this appeal.

> [Appellant] represents the herders on matters relating to their welfare, including protection of the health and strength of the reindeer herding industry.

(Appellant's Opening Brief at 2). Appellant's members conduct their reindeer operations pursuant to the Reindeer Act.

The history of reindeer in Alaska and the conditions leading to enactment of the Reindeer Act are described in the 1937 House report on the bill:

> The coming of the white man to the western and northwestern parts of Alaska brought disaster to the natives. The sources of native food on both land and sea were materially depleted and in some cases almost exterminated. By the year 1890 the Eskimos of northwestern Alaska, for the reasons mentioned, were faced with starvation. To save them, 1,280 reindeer were imported from Siberia between the years 1892 and 1902. The reindeer so imported have multiplied until they now number several hundreds of thousands. Reindeer today form the most important single element in the Eskimo economy. This is due to two factors: The variety of uses to which reindeer can be put, and their peculiar and unique adaptation to the climate and to the land and forage of that region. * * *
>
> The security of the Eskimos in the reindeer industry is threatened by nonnative ownership of deer and by nonnative occupation and control of the range. * * * In the year 1914 white men first entered the reindeer business. At the present time approximately one-third of all the reindeer in Alaska are owned by others than natives, and on certain ranges of outstanding importance to the Eskimos, the percentage is higher. Those ranges which are most attractive to nonnative owners invariably coincide with or overlap ranges essential to the welfare of the native Eskimos. * * *

> Attempts to occupy range jointly by the Eskimo and non-Eskimo owners have not been successful. Bitter conflicts have grown out of the mixing of the herds and these conflicts threaten irreparable damage not only to the reindeer industry but to the entire life and economy of the Eskimos.

H.R.Rep. No. 1188, 75th Cong., 1st Sess. 1-3 (1937).[3] During the early 1930's, the Department of the Interior undertook a number of investigations and studies of the reindeer situation in Alaska and in 1936, the Senate Committee on Indian Affairs held hearings on the matter. *See generally* R.Stern at 61-70. In 1937, identical bills were introduced in the House and Senate, providing for purchase by

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[3] Prior to 1937, Congress had made some substantive provisions for reindeer operations in the context of appropriations acts. *See, e.g.*, 48 U.S.C. § 39 (1934), derived from provisions in various appropriations acts enacted between 1907 and 1927:

"All reindeer owned by the United States in Alaska shall as soon as practicable be turned over to missions in or natives of Alaska, to be held and used by them under such conditions as the Secretary of the Interior shall prescribe. The Secretary of the Interior may authorize the sale of surplus male reindeer and make regulations for the same. The proceeds of such sale shall be turned into the Treasury of the United States. The Commissioner of Education is authorized to sell such of the male reindeer belonging to the Government as he may deem advisable and to use the proceeds in the purchase of female reindeer belonging to missions and in the distribution of reindeer to natives in those portions of Alaska in which reindeer have not yet been placed and which are adapted to the reindeer industry."

By regulation of the Department of the Interior, female reindeer distributed to Alaska Natives were made subject to restrictions against alienation. *See* Solicitor's Opinion, Apr. 2, 1930, 53 I.D. 71; Solicitor's Opinion M-26690, Sept. 16, 1931, I *Op. Sol. on Indian Affairs* 281. Reindeer controlled by Natives were held not to be taxable by the Territory of Alaska. Solicitor's Opinion, May 27, 1925, 51 L.D. 155. Restricted reindeer were held to be subject to the Secretary's authority to probate trust and restricted Indian estates. Solicitor's Opinion M-27127, July 26, 1932, 54 I.D. 15, I *Op. Sol. on Indian Affairs* 320.

the Federal Government of non-Native owned reindeer and establishment of a Native reindeer industry.[4] The Senate bill, as amended, was enacted by Congress and signed by the President on September 1, 1937.

Section 1 of the Reindeer Act, 25 U.S.C. § 500, provides:

> [A] necessity for providing means of subsistence for the Eskimos and other natives of Alaska is hereby declared to exist. It is also declared to be the policy of Congress, and the purpose of this subchapter, to establish and maintain for the said natives of Alaska a self-sustaining economy by acquiring and organizing for and on behalf of said natives a reindeer industry or business, by encouraging and developing native activity and responsibility in all branches of the said industry or business, and by preserving the native character of said industry or business thus established.

The Act authorized the Secretary of the Interior to acquire non-Native owned reindeer, as well as certain kinds of equipment, 25 U.S.C. § 500a; to distribute the acquired reindeer to Alaska Natives, 25 U.S.C. § 500g;[5] and to organize and manage a reindeer industry for the Natives, 25 U.S.C. § 500f. It required non-Native reindeer owners to file declarations of ownership. 25 U.S.C. § 500b. It imposed

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[4] H.R. 5126 was introduced on Feb. 25, 1937, by Delegate Dimond of Alaska. Shortly thereafter, S. 1722 was introduced by Senator Thomas of Oklahoma. The Secretary of the Interior recommended a number of amendments, all of which were accepted. *See* H.R. Rep. No. 1188 at 4.

[5] Section 500g was amended in 1986 to add a proviso: "That during the period of trust, income derived directly from the sale of reindeer and reindeer products as provided in this subchapter shall be exempt from Federal income taxation." This amendment followed the Ninth Circuit Court of Appeals' decision in *Karmun v. Commissioner*, 749 F.2d 567 (9th Cir.1984), *cert. denied*, 474 U.S. 819 (1985), holding that such income was subject to Federal income taxation.

restrictions upon the alienation of reindeer acquired under the Act and reindeer belonging to Alaska Natives, 25 U.S.C. § 500i, and authorized the Secretary to regulate reindeer grazing on public lands, 25 U.S.C. § 500m. Finally, it authorized an appropriation of $2,000,000 for purposes of carrying out the Act. 25 U.S.C. § 500 note.

Pursuant to the Act, the Department of the Interior purchased all non-Native-owned reindeer in Alaska. The acquisition program was completed in the winter of 1939-40.[6] Thereafter, it seems to have been generally assumed that the Reindeer Act precluded the re-entry of non-Natives into the reindeer industry in Alaska. This assumption apparently prevailed, at least within the Department of the Interior, until the events giving rise to this appeal were initiated.[7] *See, e.g.,*

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[6] The acquisitions followed the completion in 1938 of a congressionally authorized study to estimate the number of reindeer in Alaska, and the appropriation of funds in 1939. *See* H.R. Doc. No. 174, 76th Cong., 1st Sess. (1939); R. Stern at 71-73. 84,001 reindeer were purchased. Although Congress appropriated $720,000 for the program, the actual cost was less: $330,003 for reindeer purchased, $112,925.72 for improvements purchased, and $45,673.48 for administrative expenses, for a total of $491,602.20 (R.Stern at 72-73).

[7] It appears that the State of Alaska also shared this view, at least through 1979. According to a Sept. 8, 1992, memorandum of the Assistant Attorney General, Natural Resources-Anchorage, State of Alaska, a 1979 Alaska Attorney General's memorandum took the position that the Reindeer Act "had the effect of limiting ownership of reindeer in Alaska to Alaska Natives or the United States in trust for Natives" (Sept. 8, 1992, Memorandum at 4 n.5). The 1992 memorandum overrules the 1979 memorandum. No copy of the 1979 memorandum has been submitted to the Board.

A Mar. 18, 1982, memorandum of an Alaska Assistant Attorney General, which commented on draft BIA regulations, was inconsistent with the 1979 memorandum but did not overrule it. The 1982 memorandum took the position, presumably for the first time by the State, that non-Natives may engage in commercial reindeer operations without violating the Act.

Regional Solicitor's January 26, 1987, memorandum, discussed *infra*, at 1-2; letter from Deputy Solicitor to Senator Ted Stevens, July 1, 1970, II *Op. Sol. on Indian Affairs* 2016. A BIA report prepared in 1953 concluded, *inter alia*, that the Reindeer Act "should be amended to allow for greater flexibility in developing the reindeer industry and not restrict it to Natives only"[8] (R. Stern at 94). In 1961, the Bureau of Land Management (BIM) promulgated reindeer grazing regulations, which restrict grazing privileges on public lands to Natives and Native organizations. *See* 43 CFR 4310.2.

In December 1986, Thomas E. Williams, a non-Native resident of Alaska, informed the Area Director that he intended to purchase reindeer outside Alaska, import them into the State, and establish a private herd for commercial purposes. He requested an opinion from the Area Director as to whether the Reindeer Act would apply to his proposed enterprise. The Area Director sought advice from the Regional Solicitor's Office. By memorandum of January 26, 1987, an attorney in the Regional Solicitor's Office responded, stating in conclusion:

> In our view there is nothing in the 1937 Reindeer Act to prohibit a non-Native such as Mr. Williams

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The 1982 and 1992 memoranda were submitted to the Board by intervenor Williams. The 1992 memorandum, which appears to have been drafted with this appeal in mind, was received after the close of briefing. Williams failed to seek permission to make a supplemental filing. *See* 43 CFR 4.311(b). Although the document was improperly filed, the Board accepts it for the limited purpose of noting that it agrees with the Area Director's decision on appeal here and that it authorizes the issuance of State reindeer grazing leases to non-Natives.

[8] This recommendation appears to reflect the termination policy of the time in which it was made. It indicates, however, that BIA believed amendment of the Reindeer Act was necessary to allow non-Natives to enter the reindeer industry.

> from importing live reindeer from outside of the State of Alaska and raising them within the State as either a hobby or a business. He would be, however, subject to the reporting requirement of 25 U.S.C. § 500b, and the requirement that he file a declaration of ownership would apply not only to animals initially imported, but on an annual basis to any increase in his herd through calving as well. While it is true, as you observed, that establishment of non-Native commercial herds could have a serious impact on the Alaska Native reindeer industry, the Secretary of the Interior has the statutory authority to ameliorate or eliminate such impact at such time as he determines that it is necessary to acquire the non-Native owned reindeer by purchase or exercise of the power of eminent domain.

(Jan. 26, 1987, Regional Solicitor's Memorandum at 8).[9] In support of these conclusions, the memorandum states in part:

> As a means of assuring continued dominance of the industry by Alaska Natives, 25 U.S.C. § 500i prohibited any form of sale or transfer of ownership of reindeer to non-Native individuals. Criminal penalties were provided for willful violations by any buyer or other transferee. This prohibition remains on the books, and in fact continues to be enforced. But a careful reading of the statutory language demonstrates that it does not absolutely prevent an individual such as Mr. Williams from entering into commercial reindeer herding as a business. The "loophole" in the statute, if it may be fairly so characterized, arises from the specification of the animals to which the restrictions on alienation apply. Specifically, § 500i bars alienation of the following animals:

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[9] The two Regional Solicitor's Office memoranda discussed in this decision were signed by an attorney in that office, rather than the Regional Solicitor himself. However, for ease of reference, they are referred to as Regional Solicitor's memoranda.

> Live reindeer in Alaska, and the increase thereof, acquired by the Secretary of the Interior pursuant to this subchapter, and live reindeer in Alaska, and the increase thereof, owned by the said natives of Alaska or corporations, associations, or other organizations of said natives, however acquired . . .
>
> This language cannot fairly be interpreted as including within the statutory prohibition against alienation reindeer which were neither physically located within the Territory of Alaska at the time the law was passed, nor later descended from animals that were. Therefore, there is nothing in the statute to prohibit a non-Native from acquiring reindeer from outside this State's borders as Mr. Williams proposes to do. * * * Although Congress might have seen fit to expressly prohibit prospectively the importation of reindeer from outside the State, it evidently did not do so.
>
> * * * * * * *
>
> [T]he requirement with respect to filing of declarations of ownership set forth in § 500b refers to "Alaskan reindeer."[10] The most straight-forward interpretation would be that Alaskan reindeer are reindeer located within the borders of the State of Alaska. Therefore, in our view the filing require-

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[10] 25 U.S.C. § 500b provides:

"All persons, other than natives of Alaska, who upon September 1, 1937, claim title to any Alaskan reindeer shall, within one year after September 1, 1937, file in Alaska, with the duly authorized agent or agents of the Secretary of the Interior, declarations of their ownership. Similar declarations concerning Alaskan reindeer acquired by any person not a native of Alaska by purchase or by gift at any time after September 1, 1937, shall be filed as aforesaid within thirty days of such acquisition. Records of all declarations thus filed shall be made and kept open to public inspection in Alaska. If any owner of Alaskan reindeer, to whom the foregoing provisions are applicable, shall fail to file the required declaration within the stated period, he shall be barred thereafter from asserting his claim of title."

> ment in § 500b attaches to any reindeer brought into the State of Alaska, since they become, in effect, Alaskan reindeer by virtue of their presence within the borders of the State, and notwithstanding the circumstances that they may have been born, reared, and purchased in some other locality.
>
> Likewise, the calves born to imported reindeer within the State of Alaska would be subject to the § 500b filing requirement. A reasonable interpretation relative to the progeny of imported reindeer would require one annual filing with respect to calves at the conclusion of each calving season.
>
> The just-stated interpretation as to the applicability of § 500b is not only consistent with the express language of the statute, but also makes sense in terms of the structure and purposes of the 1937 Act as a whole. In order for the Secretary to make appropriate determinations as to the necessity of acquiring reindeer from non-Native owners for the purpose of preserving the Native character of the industry, he must have a means of determining the extent of non-Native ownership, the identity of individual owners, and the number of animals they own. An interpretation of § 500b which failed to impose information filing requirements across the board would be inconsistent with the general purpose and scheme of the legislation.

Id. at 3-4 and 6-7.

On March 19, 1987, Williams reported to the Area Director that he had imported 19 reindeer from Canada. He stated that the reindeer were owned by a corporation named Alaska Reindeer, Inc., for which he was the registered agent. He stated further:

> [W]hile most of the stockholders of this corporation have some native blood, none desire to claim ownership as natives. Specifically, this herd of animals is to be a commercial herd of reindeer

whose uses are not to be limited by the Act of 1937.

> These animals are to be used for shows, expositions, racing, recreation, breeding, and selling as pets. At a later date, we will sell antlers, hides, and meat, but at this time we have no intention of competing with the Alaska Native reindeer industry which we believe is solely dedicated to food production.

On December 6, 1988, Gary Arnold Engelstad, an Alaska Native and an employee of Alaska Reindeer, Inc., wrote to the Area Office, requesting a loan of trust reindeer for the purpose of starting a new herd in south central Alaska. Engelstad stated that he intended to organize a new corporation, to be called Matanuska Reindeer, Inc., of which he would own at least 51 percent of the stock. He stated further that the new corporation would lease land from Williams Farms, where it would operate a feed lot, and would raise reindeer for antler and meat production.

Following further correspondence, it became apparent that Williams would own 49 percent of the stock of the new corporation and would also be the corporation's attorney, as well as Engelstad's personal attorney (Jan. 19 and Mar. 27, 1989, Letters from Williams to Area Office).

The Area Director sought advice from the Regional Solicitor concerning whether 25 U.S.C. § 500i would preclude a corporation organized in the manner proposed by Engelstad and Williams from engaging in a reindeer business. The Area Director also requested the Regional Solicitor to reconsider his January 26, 1987, memorandum in light of a memorandum prepared by a Native American Rights Fund (NARF) attorney concerning interpretation of the Reindeer Act.

The Regional Solicitor responded on May 11, 1989. His memorandum states:

Addressing ourselves first to the specific issue regarding non-Native stock ownership, we hasten to indicate our agreement with your conclusion that the statutory prohibition is absolute and unequivocal. 25 U.S.C. § 500i, which sets forth the restriction on alienation of Alaskan reindeer, includes the following statement:

> . . . No stock or other interest in any corporation association, or other organization of said natives, engaged in or organized for the purposes of engaging in the reindeer industry or business, shall be transferred, by descent, devise, or in any other manner whatsoever, to anyone other than said natives of Alaska, the United States for and on behalf of said natives, or corporations, associations, or other organizations of said natives.

In our view, this language is unmistakable; a non-Native can hold no ownership interest at all in a corporation engaged in the business of owning, raising, or otherwise dealing in Alaskan reindeer. We would construe the prohibition of "transfer" of corporate stock broadly to preclude also the initial issuance of stock in connection with the incorporation of a reindeer business. * * *

* * * * * * *

In response to your request that we reconsider our January 26, 1987 memorandum interpreting the Reindeer Industry Act, we have carefully reviewed NARF's March 10, 1989 opinion letter, as well as the Act itself, but having done so we remain unpersuaded of the necessity for revision of our prior opinion. While the legislative history of the 1937 Act is replete with statements which indicate an *intent*, at least on the part of some, to permanently preclude non-Natives from owning live Alaska reindeer, the issue we must address in implementing the law is the *legal effect* of the congressional enactment. As we indicated two years ago, we can identify no express provision of the Act

which appears to have been violated by Mr. Williams' importation and ownership of Canadian reindeer.

There is no particular ambiguity on the face of the statute which would require us to refer to the legislative history as an aid to interpretation on the point in question. Unlike some statements made by proponents prior to enactment of the statute, the legislation's explicitly stated purpose is not permanent exclusive Native ownership, but rather establishment and maintenance for Alaska Natives of a self-sustaining economy. 25 U.S.C. § 500. Likewise, § 500a directs the Secretary of [the] Interior to acquire, *inter alia*, reindeer he deems necessary to effectuation of the Act's purpose, but does *not* expressly mandate purchase of *all* non-Native owned animals. The logical inference we draw is that these less-than-absolute provisions go hand in hand with a congressional reluctance to write a "blank check" in regard to the cost of implementing the law. In other words, Congress may have wanted to provide for permanent exclusive Native ownership, but a depression-era legislature was not willing to dictate achievement of such a goal *at any cost*. Rather, the statute directed the Secretary to exercise his discretion in acquiring reindeer so as to establish and maintain a Native reindeer industry.

* * * * * *

Nor do we believe our literal interpretation "thwarts the purpose of the overall statutory scheme or leads to an absurd result." The stated purposes of establishing and maintaining a self-sustaining economy and preserving the Native character of the reindeer industry or business have not been seriously threatened thus far by the allowance of non-Native importation of non-Alaskan reindeer, and [the NARF attorney] concedes that the Secretary of [the] Interior retains both the means and the obligation to accomplish those purposes even under our reading of the statute. Indeed, your own memorandum exp-

> resses the view that Mr. Williams' current operation presents no threat to the Native reindeer industry.[11]
>
> However, our principal reason for sticking by our original interpretation is that we can discern no statutory grounds upon which we could confidently proceed against Mr. Williams or any other individual in like circumstances. The only criminal penalty provided is a $500 fine for a willful violation of the alienation restrictions of § 500i, and we don't believe we could establish such a willful violation in Mr. Williams' case. On the civil side, the most obvious remedies would be a judicial declaration of non-ownership under § 500b, an injunction against additional imports, or local sales, or some sort of monetary damage claim for lost profits brought on behalf of Native reindeer owners. None of these forms of actions appears at present to have either a high likelihood of success or a promise of great benefit to Alaska Native reindeer herders. [Emphasis in original; footnotes omitted.]

(Regional Solicitor's May 11, 1989, Memorandum at 1-5).

During 1989, an extensive correspondence developed between Williams and the Area Office. Williams filed a large number of Freedom of Information Act requests and also asked several questions concerning enforcement of the Reindeer Act. Other correspondence concerned a purchase of 30 live reindeer from an Alaska Native. BIA requested

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[11] The Area Director's Apr. 12, 1989, memorandum to the Regional Solicitor states:

"The Bureau does not feel that Mr. Williams' operation will ever be a threat to the Native reindeer industry, so long as he is never able to obtain additional reindeer. We understand that Canadian policy has changed, so he is unable to buy reindeer from Canada now; however, that policy could change again. With U.S. Department of Agriculture quarantine regulations, live reindeer could not be shipped to Alaska from any other reindeer producing region in the world, with the possible exception of Greenland."

that Williams file a report on the purchase; Williams responded that the reindeer had been purchased by and were the sole property of Engelstad.[12]

Following an August 29, 1989, meeting at which Williams, Williams' wife, Engelstad, BIA staff, and Solicitor's Office staff were present, the Area Director sent Williams three letters in which he, *inter alia*, (1) recognized Engelstad as the owner of the purchased reindeer,[13] (2) announced a policy that would allow Natives to pledge reindeer as security for loans as long as a non-Native lender complied with 25 U.S.C. § 500i, and (3) promised to prepare regulations for publication and for interim use as Area Office policy.[14]

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[12] As a Native, Engelstad was not subject to the requirement in 25 U.S.C. § 500b for filing declarations of ownership. *See* note 10.

[13] In one of two letters dated Sept. 25, 1989, the Area Director explained BIA's concern about the reindeer purchase. He stated:

"Our past concerns regarding whether Mr. Engelstad was a bona fide purchaser arose out of circumstances that were substantially confirmed by you and your wife in the aforementioned meeting; namely, that Mr. Engelstad is an employee of Williams Farms; that you loaned Mr. Engelstad the money on an unsecured personal note to buy and transport the deer to a farm owned by your wife; and that the deer were being kept (at least on July 18) in another pen of the same corral with the deer owned by Alaska Reindeer, Inc."

[14] There are also a number of draft letters in the administrative record, some of which contain what are described as interim rules. It is not clear from the record what status the Area Office considers these "rules" to have.

At present, BIA's published regulations under the Reindeer Act are far from comprehensive, addressing only the filing of declarations of ownership. *See* 25 CFR Part 243. (As noted above, reindeer grazing on public lands is regulated by BIM under 43 CFR Part 4300.) Statements in the record indicate that BIA prepared draft regulations in 1982 or 1983 but that these fell victim to the Administration's policy favoring de-regulation. It appears, however, that BIA's difficulties in promulgating comprehensive regulations under the Reindeer Act began in the 1940's. *See* R. Stern at 81-82.

In March 1990, Williams imported 179 reindeer from Canada. In November 1990, Williams reported to BIA that Engelstad had sold all his interest in reindeer at Williams Farm to another Alaska Native, Dorinda Gastelum.[15]

In August 1991, Williams reported that Alaska Reindeer, Inc., owned 248 reindeer and Matanuska Reindeer owned 54 reindeer.

In 1991, appellant filed suit against BIA, challenging the interpretation of the Reindeer Act espoused in the two Regional Solicitor's memoranda. *Reindeer Herders Association v. Cesar*, No. A91-511 Civ (D. Alaska). Appellant filed a motion for summary judgment on April 30, 1992. By letter of May 14, 1992, an Assistant United States Attorney, who represented BIA in the litigation, suggested to appellant's counsel that she would move for dismissal of the case based on appellant's failure to exhaust administrative remedies.

Appellant agreed to pursue an administrative remedy rather than litigate the procedural issue in court. On May 27, 1992, the Area Director issued a decision formally adopting the two Regional Solicitor's memoranda. This was done in order to provide appellant with a decision appealable through the administrative appeal process.

Appellant's notice of appeal from the Area Director's decision was received by the Board on June 8, 1992. In its July 7, 1992, notice of docketing, the Board approved the request of appellant and the Area Director for expedited

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[15] Gastelum is vice-president and a director of Williams' new corporation Reindeer Herders Association, Inc. *See* "Notification [of] Appointment of Officers and Directors" accompanying the certificate of incorporation.

briefing. On July 28, 1992, Williams filed a motion to intervene. His motion was granted. All parties filed briefs.

Expedited consideration by the Board has been requested by appellant, the Area Director, and the Assistant Secretary - Indian Affairs. Expedited consideration is granted.[16]

Discussion and Conclusions

Before proceeding to the merits of this appeal, the Board addresses an apparent challenge to appellant's standing to bring the appeal. Williams contends that appellant, "an unincorporated association, and lacking the 'minimal attributes' necessary to be accountable for process and results of legal proceedings, does not have the capacity to sue and may not represent the real party in interest in this matter" (Williams' Brief at 4).

[1] An organization need not be incorporated to order to have standing before BIA or this Board. Under Board regulations, any interested party affected by a final BIA decision may file an appeal. 43 CFR 4.331. Board regulations do not define "interested party." For purposes of appeals from BIA decisions, therefore, the Board employs the

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[16] Williams opposed expedited consideration as well as expedited briefing. Although Williams was served with a copy of the notice of appeal in this case, and subsequently has had notice of all proceedings, the Board did not receive his motion to intervene and his objections to expedited briefing and expedited consideration until July 28, 1992, after expedited briefing had been approved. Despite his belated request, Williams was given an opportunity to file a brief.

Briefing has now been concluded. The Board does not see how Williams can be harmed by the Board's expedition of its consideration of this appeal. In any event, the Board finds that the reasons given by appellant, the Area Director, and the Assistant Secretary are sufficient to warrant expedition of the appeal over Williams' objection.

definition in BIA's appeal regulations at 25 CFR Part 2. *See Noyo River Indian Community v. Acting Sacramento Area Director*, 19 IBIA 63 (1990). 25 CFR 2.2 defines "interested party" as "any person who could be adversely affected by a decision in an appeal." The section defines "person" to include "an Indian or non-Indian individual, corporation, tribe, *or other organization*." (Emphasis added.) The record here is replete with evidence that appellant is in fact a functioning organization and has been in existence for a long time. The Board finds that appellant has standing to bring this appeal.

The substantive issue raised by appellant is, as the parties agree, a relatively straightforward one: Does the Reindeer Act preclude a person who is not an Alaska Native from importing reindeer into Alaska and engaging in a commercial reindeer enterprise with those imported reindeer and their progeny?

Appellant contends that the Reindeer Act does prohibit such activity even though the prohibition is not explicitly stated in the Act. Appellant argues that Congress intended to reserve the reindeer industry in Alaska exclusively to Alaska Natives; that such an intent is readily apparent in the legislative history of the Act; and that, read as a whole, the Act effectively expresses the intent of Congress to prevent the importation and commercial herding of reindeer by non-Natives.

The Area Director's position is set out, in large part, in the two Regional Solicitor's memoranda quoted above. In his brief before the Board, the Area Director argues that the Reindeer Act should not be interpreted to include a ban on importation of reindeer because (1) Congress must have been aware that reindeer could be imported because importation was the acknowledged original source of reindeer in Alaska;

(2) Congress knew how to express a blanket prohibition of impermissible conduct; (3) in accord with the maxim "expressio unius est exclusio alterius," the restrictions on alienation in 25 U.S.C. § 500i should not be extended to imported reindeer; (4) the range management provision of the Reindeer Act was viewed by Congress as a key to achievement of the statutory purposes set forth in 25 U.S.C. § 500; and (5) there is no statutory enforcement mechanism or remedy against an importer of reindeer.

The Area Director contends that

> the authority to put Mr. Williams out of business through purchase of his reindeer, either by agreement or condemnation, and the authority to exclude him from federal grazing range, are the only direct authorities over his activities which the statute provides. * * * The Juneau Area Director does not dispute the fact that he has a responsibility to exercise his discretion under [section 500a], and stands ready to do so at such point in time as the circumstances indicate the necessity to acquire non-Native-owned imported reindeer in order to accomplish the statutory purpose.

(Area Director's Brief at 14-15).

Williams supports the Area Director's decision in part and challenges it in part. With respect to the issue raised by appellant, Williams states that he is in agreement with the Area Director. However, in other respects, Williams takes issue with the Area Director, either directly or impliedly. In fact, Williams contends that the Reindeer Act does not apply to him at all. Such a contention is a clear challenge to the Area Director's findings that Williams is required to file declarations of ownership under 25 U.S.C. § 500b and that his reindeer are subject to acquisition by the Secretary under 25 U.S.C. § 500a.

[2] To the extent Williams challenges the Area Director's decision, alleging errors different than those alleged by appellant, it is arguable that he is not properly before the Board. Williams did not file a notice of appeal from the Area Director's decision. As an intervenor, he would normally be limited to the issues raised by appellant. *See Navajo Nation v. Acting Deputy Assistant Secretary--Indian Affairs (Operations)*, 15 IBIA 179, 185, 94 I.D. 172, 175 (1987); *cf. Estate of Ethel Edith Wood Ring Janis*, 15 IBIA 216 (1987). Williams clearly should have filed his own notice of appeal in order to raise some of the issues he now seeks to put before the Board. The Board notes, however, that the Area Director's decision does not show that a copy of the decision was sent to Williams. It is possible, therefore, that Williams would have a continuing right to appeal the Area Director's decision under 25 CFR 2.7 unless his challenges to the Area Director's decision are considered in the context of this appeal.[17] In order to avoid further delays in this matter, the Board will consider Williams' arguments as if he had properly filed a notice of appeal from the Area Director's decision.

[3] The Board turns to Williams' arguments before proceeding to the principal issue in this appeal. Some of his arguments, however, raise issues which are beyond the scope of this Board's jurisdiction. He argues, for instance, that, if interpreted as appellant advocates, the Reindeer Act may be in violation of the Alaska State Constitution and may therefore compel the State to terminate services to Native reindeer herders. This Board has no authority to determine

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[17] Williams became aware of the Area Director's decision at the time he was served with appellant's notice of appeal to the Board, even if he was not aware of it earlier. Under 25 CFR 2.7, however, an aggrieved person's right to appeal continues until proper notice is given by the BIA deciding official.

whether a Federal statute conflicts with the Alaska Constitution. In any case, the Board's task here is to interpret Federal law, not State law. Accordingly, even if the Board had authority to make determinations concerning State law, it would not need to do so in this case.

Williams also argues that the Reindeer Act is racially discriminatory. It appears that he may have intended to argue in this regard that the Act violates the Constitution of the United States as well as the Alaska Constitution. The Board has no authority to determine the constitutionality of a Federal statute. *E.g., Redleaf v. Muskogee Area Director*, 18 IBIA 268 (1990). The Board observes, however, that the authority of Congress to legislate for the benefit of Indians and Alaska Natives as a class is well established. *See, e.g., United States v. Antelope*, 430 U.S. 641, 645 (1977) ("Legislation with respect to these 'unique aggregations' has repeatedly been sustained by this Court against claims of unlawful racial discrimination").

Alaska Natives have long been considered to possess the same legal status as Indians and to be subject to the same plenary authority of Congress to legislate for their benefit. *E.g., Pence v. Kleppe*, 529 F.2d 135, 138 n. 5 (9th Cir.1976); *Eric v. Secretary of HUD*, 464 F.Supp. 44, 46 (D.Alaska 1978); Solicitor's Opinion M-26915, Feb. 24, 1932, 53 I.D. 593, I *Op. Sol. on Indian Affairs* 303. Congress has, on occasions other than the Reindeer Act, specifically allowed Alaska Natives certain privileges, including economic ones, which it has denied to non-Natives. For instance, Congress provided an exemption for Alaska Natives from the moratorium imposed on the taking of marine mammals by the Marine Mammal Protection Act of 1972, 16 U.S.C. §§ 1361-1407. Under 16 U.S.C. § 1371(b), certain Alaska Natives are allowed to take marine mammals if the taking is for

subsistence purposes or "for purposes of creating and selling authentic native articles of handicrafts and clothing." This Native exemption has been construed in *United States v. Clark*, 912 F.2d 1087 (9th Cir.1990), *cert. denied*, 111 S.Ct. 705 (1991), and *Katelnikoff v. United States Dept. of the Interior*, 657 F.Supp. 659 (D.Alaska 1986). From the legislative history of the exemption, as quoted and discussed in these cases, it clearly appears that the exemption was intended to protect, not only Native subsistence, but also the cash economy of the coastal Natives. Thus it appears that the purpose of the Native exemption in the Marine Mammal Protection Act is very similar to the purpose of the Reindeer Act. Both statutory provisions are components of a much larger body of Federal statutory law concerning Alaska Natives. The Board sees no reason to believe that a court would find the Reindeer Act unconstitutional as racially discriminatory.

[4] Next, Williams argues that the Reindeer Act was repealed, at least in part, by the Alaska Statehood Act of 1958, 72 Stat. 339, the Alaska Omnibus Act of 1959, 73 Stat. 141, and/or the Alaska Constiution. Specifically, he contends, the provisions of the Reindeer Act which affect non-Natives, such as the reindeer acquisition authority in 25 U.S.C. § 500a and the reporting requirement in section 500b, were repealed because they were "Territorial laws" within the meaning of subsection 8(d) of the Statehood Act.

Subsection 8(d) of the Statehood Act defines "Territorial laws" to include "all laws or parts thereof enacted by the Congress the validity of which is dependent solely upon the authority of the Congress to provide for the government of Alaska prior to the admission of the State of Alaska into the Union." Certain Territorial laws, as defined in the Statehood Act, were terminated by section 3 of the Alaska Omnibus

Act. Williams contends that the provisions of the Reindeer Act affecting non-Natives were "governmental functions" and thus subject to this provision. He does not, however, support his contention with any analysis.

It is apparent that Williams' contention must be rejected on the basis of the very statutory language he relies upon. The Territorial laws subject to repeal or termination were those whose validity was "dependent solely upon the authority of the Congress to provide for the government of Alaska." The provisions in the Reindeer Act affecting non-Natives were clearly not enacted *solely*, if at all, under Congress' power to govern the Territory. Rather, the validity of those provisions, and the validity of the Reindeer Act as a whole, is grounded first and foremost in the plenary power of Congress to legislate for the benefit of Alaska Natives. The Board rejects Williams' argument that the Reindeer Act has been repealed in part.

The Board returns to the principal issue in this appeal--whether a non-Native may engage in the reindeer industry in Alaska, using imported reindeer, without running afoul of the Reindeer Act.

At the outset, the Board observes that the Area Director's interpretation of the Reindeer Act is not an unreasonable one. As the Area Director persuasively argues, no provision in the Reindeer Act explicitly prohibits the importation of reindeer into Alaska or explicitly precludes a non-Native from entering the reindeer business, using imported reindeer. However, even though reasonable, the Area Director's interpretation is clearly adverse to the interests of the Natives for whose benefit the statute was enacted. Under rules of statutory construction applicable to Indian legislation, discussed *infra*, an interpretation of a statute, even though reasonable, must be

rejected if another interpretation is possible, which is more favorable to the Native beneficiaries.

Appellant contends that its interpretation of the Reindeer Act is both reasonable and supported by the statutory language and the legislative history. First, it argues that Congress' intent to exclude non-Natives from the reindeer industry is evident in 25 U.S.C. § 500, quoted *supra*, which indicates that a purpose of the Reindeer Act is to "preserv[e] the native character of the industry." In appellant's view, the reindeer industry can be Native in character only if it is exclusively Native.

It is arguable, however, that the "reindeer industry" with which section 500 is concerned is not the entire reindeer industry in Alaska, but only the reindeer industry which the Act created for Natives. Under this interpretation, a non-Native reindeer industry, parallel to the Native industry, might exist in Alaska without offending section 500.[18] A provision in 25 U.S.C. § 500i, however, appears to resolve any ambiguity in section 500 with respect to the scope of the reindeer industry encompassed by the Act. Section 500i, *inter alia*, authorizes the Secretary of the Interior to promulgate regulations governing transfer of reindeer "for the purpose[] of preserving the native character of the reindeer industry or business in Alaska." This explicit statement makes clear that the Act was intended to encompass the entire reindeer industry in Alaska. The Board therefore concludes that Congress intended in the Reindeer Act to require preservation of the Native character of the entire reindeer industry in Alaska. Even so, it does not necessarily follow, from this language alone, that Congress intended the

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[18] This is the theory espoused in the Mar. 18, 1992, Alaska Assistant Attorney General's memorandum submitted by Williams in this appeal. *See* note 7.

reindeer industry in Alaska to be exclusively Native. It is conceivable that the industry could be Native in character even though not exclusively Native.

Appellant further contends that the explicit restrictions in 25 U.S.C. § 500i demonstrate an intent not to allow non-Native ownership of reindeer. In particular, appellant notes, Congress explicitly prohibited the re-importation of live reindeer previously exported from Alaska and reasons that, given this prohibition, Congress could not have intended to allow importation of foreign reindeer.

25 U.S.C. § 500i provides in its entirety:

> Live reindeer in Alaska, and the increase thereof, acquired by the Secretary of the Interior pursuant to this subchapter, and live reindeer in Alaska, and the increase thereof, owned by the said natives of Alaska or corporations, associations, or other organizations of said natives, however acquired, shall not be sold or transferred, by descent, devise, or in any other manner whatsoever, to anyone other than the said natives of Alaska[,] the United States for and on behalf of said natives, or corporations, associations, or other organizations of said natives, except with the consent in writing of the Secretary of the Interior or his duly authorized agent, stating that such consent is given upon the condition that the reindeer, and any increase thereof, sold or otherwise transferred with said consent, shall either be butchered in the Territory of Alaska within thirty days or shipped out of said Territory and never brought back alive into said Territory. Sales or other transfers of said reindeer, if made without the consent in writing herein required, or, although made with such consent, if followed by failure to comply with the condition therein required, shall be null and void, and shall not pass any title to or right to possession of any reindeer or increase thereof. No stock or other interest in any corporation, association, or other organization of said natives,

> engaged in or organized for the purposes of engaging in the reindeer industry or business, shall be transferred, by descent, devise, or in any other manner whatsoever, to anyone other than said natives of Alaska, the United States for and on behalf of said natives, or corporations, associations, or other organizations of said natives. Any willful violation of the provisions of this section by any vendee or other transferee shall be punishable by a fine of not more than $500: *Provided*, That no title to any reindeer, or any reindeer products, owned by the United States for and on behalf of the said Natives of Alaska, nor any title to reindeer, or reindeer products, owned by any of said natives or said corporations, associations, or other organizations of said natives, nor any stock or other interest in said corporations, associations, or other organizations of said natives, shall be transferred by descent, [devise] or in any other manner whatsoever, except pursuant to regulations promulgated by the Secretary of the Interior for the purposes of preserving the native character of the reindeer industry or business in Alaska and effectuating the other purposes of this subchapter: *Provided further*, That nothing herein contained shall prevent any native of Alaska who owns any reindeer or any interest therein through stock ownership, or otherwise, in any corporation or association or other organization owning reindeer, from transferring his reindeer, or any interest therein, to his children or other native relatives by gift, sale, devise, or bequest, or prevent the same from being transferred or passed by descent.

Appellant and the Area Director have widely divergent views of the import of this section. While appellant sees evidence of Congress' attempts to keep live reindeer out of the possession of non-Natives, the Area Director invokes the maxim "expressio unius est exclusio alterius" to contend that, since the section specifically mentions only reindeer owned by the United States, Natives, or Native corporations, Congress must have intended to exclude reindeer owned by others from

the scope of the section.

It is true that the principal thrust of the section is to impose restrictions upon the alienation of Native and Government-owned reindeer. The section does much more, however. The restrictions imposed upon these reindeer differ markedly from the usual restrictions imposed upon Indian trust or restricted property in that they continue to affect the property after it has left Native ownership. These continuing restrictions upon reindeer in the hands of non-Native transferees ensure that the transferees do not retain ownership of live reindeer in Alaska. It seems indisputable that the purpose of these post-transfer restrictions was to preclude the re-emergence of a non-Native reindeer industry descended from reindeer purchased from Natives. As appellant contends, there would seem to be little point to these detailed restrictions if they could so easily be circumvented with imported reindeer. Certainly, the extent to which the Native reindeer industry would be adversely affected by non-Native commercial reindeer operations does not depend upon the source of the reindeer with which the non-Native operations are launched.

[5] Appellant places substantial reliance on the legislative history of the Reindeer Act, which, on the whole, is very supportive of its position. There are a number of explicit statements in the legislative history which reflect an understanding that the bill under consideration, if enacted, would result in the permanent elimination of non-Native reindeer ownership in Alaska.

For instance, the House report states:

> At the present time only one solution [to the problems caused by conflicts between Natives and non-Natives] seems practicable and that lies in the purpose of the bill under consideration for the

> purchase by the Government of all nonnative-owned reindeer and such reindeer range equipment as may be useful and the distribution of the same among the natives or the holding of such reindeer and other property by the Government in trust for the use of the natives. *With the permanent elimination in this manner of the nonnative owners*, the problem will be a comparatively simple one, for then all of the deer will be native deer and the deer may be distributed and the ranges allocated in an equitable manner satisfactory to the natives. [Emphasis added.]

H.R. Rep. No. 1188 at 3. The House report also includes a letter from the Secretary of the Interior recommending amendments to the original bill but supporting its enactment. The Secretary stated:

> The experience of the Department in the administration of the affairs of the natives of Alaska and of the Reindeer Service convinces me that nonnative ownership of deer must be eliminated and the industry must be operated in a manner guaranteeing the economic security to the native residents of the reindeer areas. * * * *It is believed that the reindeer industry will not be assured permanently to the natives of Alaska unless all possibility of white ownership be eliminated.* It will therefore be necessary to buy all the deer of a nonnative owner on a given range or all interests in ownership. If only deer are purchased which are run through a corral or chute, nonnative ownership will still attach to escaped deer on the range or to stray deer on other ranges.[19] Such a situation would be calamitous and we would in a space of a few years be faced with the same situation we now seek to eliminate entirely and avoid forever. [Emphasis added.]

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[19] The original bill provided that "all reindeer purchased must be actually counted in corrals or through chutes or in some other effective manner." 81 Cong. Rec. 9471 (1937) (remarks of Delegate Dimond). In accordance with the Secretary's recommendation, this provision was deleted.

Id. at 5.

Statements made on the House floor by the House sponsor of the bill, Delegate Dimond of Alaska, are in accord. At one point, he stated:

> The purpose of the bill is to purchase all of the reindeer of Alaska, now owned by others than natives, * * * and that *thereafter the reindeer in Alaska shall be reserved as to ownership and grazing for the natives alone, so that all others than natives will be excluded from the reindeer business or industry.* * * *
>
> We are now seeking to do the thing that should have been done when reindeer were first brought to Alaska. From the very beginning the reindeer should have been reserved for the use or benefit of the natives and no one but natives should ever have been permitted to own or graze a reindeer in the Territory. [Emphasis added.]

81 Cong. Rec. 9471. Delegate Dimond's remarks were made during an extended debate on the House floor, in which he forcefully advocated enactment of the bill. The bill proved controversial in the House because it was considered costly and because it was thought by some to be a bail-out for the Northwestern Livestock Corporation, formerly Lomen and Company, which owned most of the non-Native reindeer in Alaska. This company was in financial difficulty at the time and was generally considered to have been the principal catalyst of the conflict between Native and non-Native reindeer owners. Supporters of the bill acknowledged that it was costly but argued that its effects would be permanent and would ultimately result in a cost benefit to the Federal Government because the Natives would become self-supporting. *See, e.g.*, Remarks of Rep. Green, 81 Cong.

Reg. 9480: "If we pass this bill, the result we hope will be, and I think it will be, that as the white Alaskan reindeer owner vanishes from Alaska the native owner and the native Eskimo will be enabled to survive without the Federal Government having to contribute to his existence." In the end, despite heated opposition, the bill was passed by a vote of 109 to 51. It is apparent from a reading of the complete debate that House members were well aware that the bill was proposed as a measure which would, *inter alia*, preclude the future involvement of non-Natives in commercial reindeer operations in Alaska.

Consideration of the bill in the Senate was considerably less protracted than in the House. *See* 81 Cong. Rec. 4278-80, 9569-70. The legislative history shows, however, that the Senate's understanding of the bill was similar to that of the House. Senator Thomas of Oklahoma, the sponsor of the bill in the Senate, explained the bill on the floor of the Senate, stating in part: "The pending bill has for its purpose the taking of title to reindeer in northern Alaska and holding the title in the Government for the benefit of the Eskimos. * * * It provides further for the operation of the reindeer industry as a governmental institution for the benefit of the Eskimos." 81 Cong. Rec. 4278. Senate Report No. 474, 75th Cong., 1st Sess. (1937), states at page 3:

> These problems [concerning conflicts between Native and non-Native reindeer owners], together with the charges and counter-charges of distraught and bewildered reindeer owners, have been the subject of several lengthy investigations and voluminous reports. A review of the entire matter, the scope, details, and seriousness of which this presentation can only indicate, forces the conclusion that *the rehabilitation of the Eskimo started in 1892 can be safeguarded and continued only if complete ownership of deer and control of the range is again established in the natives or in the Government on*

behalf of the natives. [Emphasis added.]

While acknowledging that many statements in the legislative history support appellant's position, the Area Director also invokes the legislative history in support of his own position. He contends that it supports his argument that Congress depended in large part upon the range management provision of the Act, 25 U.S.C § 500m, to accomplish the purposes of the Act.[20] He contends that "the grazing management provision, rather than any prohibition of non-Native importation of reindeer, was seen as the key to preserving the Native character of the industry" (Area Director's Brief at 12).[21]

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[20] 25 U.S.C. § 500m provides:

"In order to coordinate the use of public lands in Alaska for grazing reindeer with the purposes of this subchapter, the Secretary of the Interior is hereby authorized to regulate the grazing of reindeer upon said lands. He may, in his discretion, define reindeer ranges and regulate the use thereof for grazing reindeer; issue grazing permits; regulate and control all round-ups, handlings, markings, and butcherings of reindeer upon said public lands; and may issue rules and regulations to carry into effect the provisions of this section. Any person who willfully violates any of the rules and regulations promulgated for the purpose of carrying into effect the provisions of this section shall be deemed guilty of a misdemeanor and, upon conviction thereof, shall be punished by imprisonment for not more than one year or by a fine of not more than $500."

[21] Appellant charges the Area Director with inconsistency in making this argument. It contends that, although 25 U.S.C. § 500m does not explicitly restrict reindeer grazing to Natives, the Area Director is here willing to read such a restriction into the section, when he is unwilling to find that the Act as a whole restricts the reindeer industry to Natives.

It was actually BLM which, in implementing the Act, explicitly restricted reindeer grazing on Federal lands to Natives. 43 CFR 4310.2. No explanation of this restriction appears in the Federal Register preambles to the proposed and final rulemaking. *See* 26 FR 6476 (July 19, 1961); 26 FR 12696 (Dec. 29, 1961). Given the lack of any explicit restriction in 25 U.S.C. § 500m, the Board assumes that BLM

There is no doubt that Congress viewed the range management provision as an important aspect of the Act. This provision was not a part of the original bill, however, but was added pursuant to a recommendation of the Secretary of the Interior, whose expressed concern was for preservation of the range. In recommending the amendment, the Secretary stated:

> One of the factors basic in insuring the food supply of the natives of Alaska from reindeer is the proper use of the range. At the present time certain ranges have become so overgrazed as to constitute a serious menace to the continuation of the reindeer industry in those regions and it is believed to be highly important that this bill providing for a self-sustaining economy for the natives of Alaska should contain authority for the regulation of reindeer grazing, round-ups, handlings, marketing, and butchering.

H.R. Rep. No. 1188 at 6. It is true, as the Area Director contends, that Delegate Dimond made statements indicating that a purpose of the range management provision was to exclude non-Natives from the reindeer industry. *See, e.g.*, his remarks at 81 Cong. Rec. 9472: "[I]t is necessary to purchase these deer as are owned by the white men and distribute them among the natives and forever forbid, through the control of the range, white men from going into the business so that we will never have to go back and do this job all over again." However, most of the floor comments about range management reflected the concern expressed in the

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considered its authority to impose the restriction as deriving from the Reindeer Act as a whole.

It is certainly arguable, as appellant's contention suggests, that the Area Director's present position is inconsistent with the BLM regulation.

Secretary's recommendation, *i.e.*, the need to prevent overgrazing. *See, e.g.*, Remarks of Rep. Knutson, 81 Cong. Rec. 9481; Rep. Dempsey, 81 Cong. Rec. 9484, 9492; Rep. Engelbright, 81 Cong. Rec. 9485. Further, although it is clear that Congress viewed the presence of non-Native herders on the range as a problem, it is also clear that it did not consider range management alone adequate to solve the problem. Indeed, the House rejected the suggestion made at one point during the debate that the entire purpose of the bill could be accomplished by regulation of the range.[22] Clearly, if Congress had believed that regulation of the range would be adequate to accomplish the purpose of the Act, once the initial reindeer acquisitions had been made, it would not have seen a need to enact the elaborate post-transfer restrictions upon reindeer in 25 U.S.C. § 500i. *See* discussion, *supra*. In any event, regulation of the range in Federal ownership, even if it had been adequate at one time to enforce the Act, can hardly be considered adequate now, because much of the formerly Federal land has passed out of Federal ownership. The Board rejects any implication in the Area Director's argument that Congress saw range management as the exclusive means of enforcing the Act.

[6] Appellant next contends that the Department of the Interior, contemporaneous with enactment of the Reindeer Act, construed the Act to restrict the reindeer industry to

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[22] Rep. Taber stated:

"I do want to say one other thing now with reference to the bill. It appears that every bit of this grazing land is in Government ownership. This is the statement of the Delegate from Alaska. It is under Government control, and everything that is needed to do to maintain this grazing land for the Eskimo is for the Government, by law or otherwise, to establish a regulation so that only the Eskimo can have this privilege. There is not any sense at all in going through all this rigmarole and spending all this money to accomplish something that can be done in a very simple way." 81 Cong. Rec. at 9488

Natives. It further contends that the Department's contemporaneous interpretation is entitled to respect.

It is clear that the Department initially interpreted the Act as authorizing and requiring the Department to eliminate all non-Native ownership of reindeer. This understanding is reflected not only in the statements made to Congress by the Secretary of the Interior, but also in the fact that the Department proceeded as soon as possible to acquire all non-Native-owned reindeer. Further, as noted above, until very recently, the Department appears to have maintained the view that only Natives could engage in the reindeer industry.

In *Udall v. Tallman*, 380 U.S. 1, 16 (1965), the Supreme Court stated:

> When faced with a problem of statutory construction, this Court shows great deference to the interpretation given the statute by the officers or agency charged with its administration. * * * "Particularly is this respect due when the administrative practice at stake 'involves a contemporaneous construction of a statute by the men charged with the responsibility of setting its machinery in motion, of making the parts work efficiently and smoothly while they are yet untried and new.' " [Citations omitted.]

The Court also places value on the consistency of an administrative interpretation. *See, e.g., Watt v. Alaska*, 451 U.S. 259, 272-73 (1981) ("The Department's contemporaneous construction carries persuasive weight. * * * The Department's current interpretation, being in conflict with its initial position, is entitled to considerably less deference." (Citations omitted.) This does not mean, of course, that an agency is precluded from ever changing a longstanding interpretation of a statute. *Cf. Montana v. Blackfeet Tribe*, 471 U.S. 759, 768 n. 7 (1985). It suggests, however, that

such a change should be made with caution and only upon a conclusion that the Department's initial interpretation was clearly erroneous.

Finally, appellant contends that its position is supported by principles of statutory construction governing the interpretation of statutes enacted for the benefit of Indians. Appellant cites *Winters v. United States*, 207 U.S. 564 (1907), and *Alaska Pacific Fisheries v. United States*, 248 U.S. 78 (1918), in support of its position. Appellant's reliance on these cases suggests that, in a broad sense, appellant views Congress as having purchased a "reservation" for Alaska Natives, consisting of the reindeer industry in Alaska.[23]

Although the Reindeer Act is unique, its underlying intent is somewhat analogous to one of Congress' traditional reasons for establishing Indian reservations--to enable the Indians to remain or become self-sustaining through undisturbed utilization of reservation resources. The Supreme Court has interpreted some of the treaties and statutes creating reservations as having impliedly reserved for the Indians certain property or rights not specifically mentioned in the authorizing enactments. In *Winters*, the Court held that an 1888 agreement establishing the Fort Belknap Reservation included an implied reservation of water sufficient for

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[23] *Cf.* F. Cohen, *Handbook of Federal Indian Law* 409 (U.S. Dept. of the Interior, 1942): "The most important law relating to reindeer is the Act of September 1, 1937, which is designed to establish for the natives of Alaska a self-sustaining economy *by acquiring for them the whole reindeer business*, and to develop native activity in all branches of the industry (Emphasis added; footnote omitted)"; Senator Thomas' statement on the floor of the Senate: "The pending bill has for its purpose *the taking of title to reindeer in northern Alaska and holding the title in the Government for the benefit of the Eskimos.*" 81 Cong. Rec. 4278 (emphasis added).

irrigation purposes. In *Alaska Pacific Fisheries*, the Court held that the statute setting aside "the body of lands known as Annette Islands" for the Metlakatla Indians impliedly reserved as well the adjacent waters and submerged land. In both cases, the Court found that the implied reservations were necessary to carry out the purposes of the Congressional enactments. In both cases, the Court invoked the rule of construction which requires that ambiguities in treaties and statutes be resolved in favor of the Indians. In *Winters*, the Court stated that this rule should "certainly be applied to determine between two inferences, one of which would support the purpose of the agreement and the other impair or defeat it." 207 U.S. at 577. *See also Alaska Pacific Fisheries*, 248 U.S. at 89.

The circumstances present in *Alaska Pacific Fisheries* present a number of interesting parallels to the case at issue here. The Metlakatla Indians had emigrated from Canada in 1887 and settled on one of the Annette Islands because, the Court noted, "the fishery adjacent to the shore would afford a primary means of subsistence and a promising opportunity for industrial and commercial development." 248 U.S. at 88. Four years later, Congress set apart for their benefit "the body of lands known as Annette Islands." In 1916, a non-Indian corporation built a fish-trap approximately 600 feet from the high-tide line of the island on which the Indians lived. The Court noted that operation of the fish-trap would "tend materially to reduce the natural supply of fish accessible to the Indians." 248 U.S. at 87.

In determining what Congress meant by the term "the body of lands known as Annette Islands," the Court observed that

> [t]he purpose of creating the reservation was to encourage, assist and protect the Indians in their effort to train themselves to habits of industry,

> become self-sustaining and advance to the ways of civilized life. * * * The Indians could not sustain themselves from the use of the upland alone. The use of the adjacent fishing grounds was equally essential. Without this the colony could not prosper in that location. * * * Evidently Congress intended to conform its action to their situation and needs.

Id. at 89. The Court concluded that the reservation "embrac[ed] the intervening and surrounding waters as well as the upland," continuing:

> This conclusion has support in the general rule that statutes passed for the benefit of dependent Indian tribes or communities are to be liberally construed, doubtful expressions being resolved in favor of the Indians. * * * And it has further support in the facts that, save for the defendant's conduct in 1916, the statute from the time of its enactment has been treated, as stated in the opinion of the Alaska court, by the Indians and the public, as reserving the adjacent fishing grounds as well as the upland, and that in regulations prescribed by the Secretary of the Interior on February 9, 1915, the Indians are recognized as the only persons to whom permits may be issued for erecting salmon traps at these islands. [Citation omitted.]

Id. at 89-90.

In this case, it is clear from the face of the Reindeer Act and its legislative history that Congress sought to encourage and protect Alaska Natives in their efforts to become self-sustaining through a reindeer industry. It is abundantly evident that Congress was aware that the entry of non-Natives into the reindeer business had proved devastating to the Native industry in the past, and numerous explicit statements in the legislative history illustrate an intent to exclude non-Natives from the industry permanently. There can be no doubt that, in enacting the Reindeer Act, "Congress intended to conform its action to [the Natives'] situation and

needs." In this case, the Natives' recognized need was an opportunity to develop and manage a reindeer industry unthreatened by non-Native competition.

Further, as was the case in Alaska Pacific Fisheries, the Reindeer Act has been treated by the Department of the Interior, the Natives, and the public, at least until Williams appeared on the scene in 1986, as having reserved the privilege of engaging in the reindeer industry in Alaska exclusively to Alaska Natives.

Finally, as in *Alaska Pacific Fisheries*, the Department of the Interior has promulgated regulations recognizing Natives as the only persons to whom reindeer grazing permits may be issued.

Thus, under the analysis in *Alaska Pacific Fisheries*, it appears that Congress should be deemed to have reserved the entire reindeer industry to the Natives--in other words, to have precluded non-Natives from engaging in the industry.

[7] The rule of statutory construction invoked in *Winters* and *Alaska Pacific Fisheries* is still vital today. In employing the principle recently, the Supreme Court stated: "When we are faced with these two possible constructions, our choice between them must be dictated by a principle deeply rooted in this Court's Indian jurisprudence: 'statutes are to be construed liberally in favor of the Indians, with ambiguous provisions interpreted to their benefit.'" *County of Yakima v. Confederated Bands & Tribes of the Yakima Indian Nation*, 112 S.Ct. 683, 693 (1992). Where a choice lies between two inferences, one of which would support the purpose of the statute and the other impair or defeat it, Winters teaches that the rule must be applied. There seems to be no doubt that an interpretation which would allow non-Natives to re-enter the

reindeer industry in Alaska would impair or defeat the purpose of the Reindeer Act.[24]

The Board cannot agree with the Regional Solicitor's statement that "there is no particular ambiguity on the face of the [Reindeer Act]" (Regional Solicitor's May 11, 1989, memorandum at 3, quoted supra). There is neither a specific prohibition of, nor a specific allowance of, importation of foreign reindeer for commercial purposes. The lack of any explicit provision concerning this matter, in the face of the overall purpose expressed in the Act, creates a significant ambiguity. To resolve this ambiguity, it is both appropriate and necessary to employ the principle discussed. While, as noted above, the Area Director's interpretation of the statute is a reasonable one, it is also reasonable to conclude, especially in light of the strong support for such a conclusion in the legislative history, that Congress intended to preclude the re-entry of non-Natives into the reindeer industry. Accordingly, this ambiguity in the Reindeer Act must be

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[24] Williams states that he has only 300 reindeer and maintains them on his own land. He contends that his operation could never be a threat to the Native industry, in part because, according to him, the Natives have "exclusive, free access to millions of acres of Native, Federal and State lands" (Williams' Motion to Intervene at 5). It is apparent, however, that Williams' herd has increased markedly since 1987. Moreover, the arguments he makes before this Board suggest that he will seek to lease State-owned lands for reindeer grazing. And, apparently, the State would not deny him a permit on the grounds that he is a non-Native. *See* note 7.

It clearly appears to have been recognized by Congress that herds of a size to threaten the Native industry could well evolve from an initially small number of reindeer. Thus, for instance, Congress accepted the amendment proposed by the Secretary of the Interior which would allow the Department to purchase escaped and stray reindeer, the absence of which authority the Secretary stated would lead to a situation where "we would in a space of a few years be faced with the same situation we now seek to eliminate entirely and avoid forever." H.R. Rep. No. 1188 at 5.

resolved in the Natives' favor.

[8] Another principle of statutory construction, if applied here, would produce the same result as the rule just discussed. It is described in 2B N. Singer, *Sutherland on Statutory Construction*, § 54.05 (5th ed. 1992):

> Broadly speaking, the language of a statute will be extended to include situations which would reasonably have been contemplated by the legislature in light of the circumstances giving rise to the legislation. If the language of a statute reasonably covers a situation, the statute applies irrespective of whether the legislature ever contemplated that specific application. In the words of the First Circuit Court of Appeals [in *Johnson v. United States*, 163 F. 30 (1st Cir.1908)] "it is not an adequate discharge of duty for courts to say: We see what you are driving at, but you have not said it, and therefore we shall go on as before."

See also United States v. Ron Pair Enterprises, Inc., 498 U.S. 235, 242 (1989): "The plain meaning of legislation should be conclusive, except in the 'rare cases [in which] the literal application of a statute will produce a result demonstrably at odds with the intentions of its drafters.' * * * In such cases, the intention of the drafters, rather than the strict language, controls." On at least two recent occasions, the Ninth Circuit Court of Appeals has employed this exception to enforce a statute beyond its literal terms. *See Commodity Futures Trading Comm'n v. P.I.E., Inc.*, 853 F.2d 721, 725 (9th Cir.1988); *Trailer Train Co. v. State Board of Equalization*, 697 F.2d 860, 866 (9th Cir.), *cert. denied*, 464 U.S. 846 (1983) ("A court may look beyond the express language of a statute where a literal interpretation thwarts the purpose of the overall statutory scheme or leads to an absurd result").

There is no doubt that a literal interpretation of the Reindeer Act, to the extent it would allow the reentry of non-Natives into the reindeer industry, conflicts with the intention of its drafters and thwarts the purpose of the overall statutory scheme. Further, insofar as the Act is interpreted to be unenforceable except by the Federal purchase of reindeer, it produces the potentially absurd result of guaranteeing a market to non-Natives who import reindeer.

It is apparent that this rule of statutory construction is appropriately applied only in rare circumstances. Here, however, the rule serves to reinforce the result reached under the previously discussed rule concerning construction of Indian statutes. Thus, it has added force in this case.

The Board holds that, given the overall statutory scheme, the strong legislative history, and the rules of statutory construction discussed, the Reindeer Act must be construed to prohibit non-Native entry into the reindeer industry in Alaska, regardless of the source of the reindeer involved.

Describing the prohibition and enforcing it, however, are two different things. It appears from the Regional Solicitor's May 11, 1989, memorandum, that a perceived difficulty of enforcement helped him to reach the conclusion he did. Appellant and the Area Director agree that a "remedy" is available through Federal purchase of non-Native-owned reindeer. Thereafter, however, they part company.

Appellant contends that 25 U.S.C. § 500i is applicable to Williams' reindeer and requests that Williams be ordered to slaughter them or ship them out of Alaska in accordance with that section. The Board cannot agree that this section can be construed to authorize such an order. As discussed above, section 500i by its terms is applicable only to reindeer owned

or sold by the United States, Natives, or Native organizations.

Further, Williams cannot be deemed to have forfeited title to his reindeer under 25 U.S.C. § 500b, because he has filed declarations of ownership, as required by that section, on a regular basis.

In his May 11, 1989, memorandum, the Regional Solicitor noted that civil remedies are available but doubts that they would be likely to succeed or that they would be of any great benefit to the Native reindeer herders. *See* Regional Solicitor's Memorandum, May 11, 1989, at 5, quoted *supra.*

In this case, in light of Williams' reliance on advice given by BIA, it appears that BIA should purchase or condemn the reindeer presently owned by him rather than attempt to pursue a more drastic remedy. Clearly, however, Federal acquisition of reindeer cannot be viewed as a satisfactory long-term enforcement mechanism if Williams and/or others continue to import reindeer for the purpose of engaging in commercial reindeer operations. Accordingly, BIA should begin to consider other means of enforcing the Act.[25]

25 U.S.C. § 500a authorizes the Secretary to acquire reindeer, "the acquisition of which he determines to be necessary to the effectuation of the purposes of [the Reindeer Act]." The Area Director contends that this authority gives him the discretion to determine when "the circumstances indicate the necessity to acquire non-Native-owned reindeer in order to accomplish the statutory purpose" (Area

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[25] In addition to the litigation possibilities mentioned by the Regional Solicitor, diplomatic or legislative options might be considered. The Board assumes that BIA's efforts to promulgate regulations are ongoing. Published regulations would, of course, aid in future enforcement of the Act.

Director's Brief at 15). The Regional Solicitor's May 11, 1989, memorandum suggests, at pages 4-5, that such circumstances would be present when importation of reindeer by non-Natives "seriously threatens" the Act's purposes of "establishing and maintaining a self-sustaining economy and preserving the Native character of the reindeer industry or business." The memorandum does not further describe how or at what point the Area Director would determine that a serious threat to the Native industry was present.

Section 500a clearly vests discretion in the Secretary with respect to the acquisition of reindeer. However, to the extent the Area Director contends that this discretion is unfettered, the Board disagrees. The Area Director's discretion is limited by the requirement that he carry out the intent of the statute. As discussed above, the Board has held that Congress intended to reserve the reindeer industry exclusively to the Natives and to exclude non-Natives from the industry.

The Board concludes that the discretion vested in the Secretary by section 500a is the discretion to determine how the intent of the statute should be implemented. That is, section 500a allows him to take other actions, such as initiating litigation, to accomplish the intent of the statute and, if such action proves adequate, relieves him of any obligation to purchase the reindeer because acquisition would no longer be "necessary to the effectuation of the purposes of [the] Act."[26] The section presumably allows him to disregard small numbers of imported reindeer kept as pets or for subsistence purposes by the non-Native individuals who imported them.[27] It does not, however, permit him to allow

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[26] The Secretary's determination, through BLM, to restrict reindeer grazing on public lands to Native herders can also be viewed as an exercise of this discretion.

[27] Non-Natives are required under 25 U.S.C. § 500b to file declarations of ownership for their imported reindeer, even under these

the development of non-Native commercial herds to the point where they "seriously threaten" the Native industry, when to do so is likely to lead to the need for another major Federal buy-out of non-Native reindeer.[28] This is an eventuality Congress sought to avoid, as is abundantly evident from the legislative history of the Act.

The Board holds that, where BIA learns that non-Native-owned reindeer are kept for commercial purposes, it is required to take some action to eliminate the threat or potential threat to the Native industry. The Board further holds that the manner in which action is to be taken is within BIA's discretion to determine.

Therefore, pursuant to the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 CFR 4.1, the Juneau Area Director's May 27, 1992, decision is reversed, and this matter is remanded to him for further action.

s/ Anita Vogt
Administrative Judge

I concur:
s/ Kathryn A. Lynn
Chief Administrative Judge

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circumstances. Under section 500b, a non-Native who fails to do so is "barred thereafter from asserting his claim of title." It may be that the Secretary would bear some responsibility to seize unreported reindeer or otherwise enforce this section. Because this case does not involve unreported reindeer, the Board reaches no conclusion in this regard.

[28] As noted, the point at which a serious threat would be perceived is not specified by the Area Director. Presumably, the seriousness of a threat would be determined, in part at least, by the number of reindeer in non-Native ownership. It is entirely possible that a threat would not be deemed serious until Williams' and/or other non-Native-owned herds had increased to the point where the acquisition costs to the Federal Government would be considerable. *See* also note 24.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 95-35607
D.C. No. CV-94-00245-JWS

THOMAS E. WILLIAMS; ALASKA REINDEER, INC.; REINDEER HERDERS ASSOCIATION, INC.,

Plaintiffs-Appellants,

v.

BRUCE BABBITT, in his capacity as the United States Secretary of the Interior; CESAR NILES, in his capacity as Juneau Area Director of the United States Bureau of Indian Affairs,

Defendants-Appellees,

KAWERAK REINDEER HERDERS ASSOC.,

Defendant-intervenor-Appellee.

FILED OCT 9 1997
CATHY A. CATERSON, CLERK
U.S. COURT OF APPEALS

ORDER

Before: GOODWIN, BRUNETTI and KOZINSKI, Circuit Judges

The petition for rehearing is denied. The full court has been advised of the suggestion for rehearing en banc and no active judge has requested a vote thereon. The suggestion for

rehearing en banc is therefore rejected. Fed. R. App. P. 35(b).

Because the government's litigation position was substantially justified, Appellants' Application for Attorney's Fees is denied.

REINDEER INDUSTRY ACT OF 1937
(25 U.S.C. §§ 500 et seq.)

[Act of 1 Sept. 1937, c. 897, 50 Stat. 900, *as amended*, Pub. L. No. 99-514 (22 Oct. 1986), § 1709(a), 100 Stat. 2783]

§ 500. Purpose

A necessity for providing means of subsistence for the Eskimos and other natives of Alaska is hereby declared to exist. It is also declared to be the policy of Congress, and the purpose of this subchapter, to establish and maintain for the said natives of Alaska a self-sustaining economy by acquiring and organizing for and on behalf of said natives a reindeer industry or business, by encouraging and developing native activity and responsibility in all branches of the said industry or business, and by preserving the native character of the said industry or business thus established.

§ 500a. Acquisition of reindeer and other property

The Secretary of the Interior is hereby authorized and directed, to acquire, in the name of the United State, by purchase or other lawful means, including exercise of the power of eminent domain, for and on behalf of the Eskimos and other natives of Alaska, reindeer, reindeer-range equipment, abattoirs, cold-storage plants, warehouses, and other property, real or personal, the acquisition of which he determines to be necessary to the effectuation of the purposes of this subchapter. Any condemnation proceedings undertaken by virtue of the authority granted in this section shall conform, as nearly as may be, to the procedure provided for the condemnation of real estate by sections 257 and 258 of Title 40, or to that provided by sections 258a to 258e of Title 40: *Provided*, That nothing herein contained shall authorize the Secretary of the Interior to consolidate native-owned herds of reindeer with herds owned by others than natives prior to

the purchase or acquisition of such herds of others than natives.

§ 500b. Filing claim of title to reindeer by nonnatives

All persons, other than natives of Alaska, who upon September 1, 1937, claim title to any Alaskan reindeer shall, within one year after September 1, 1937, file in Alaska, with the duly authorized agent or agents of the Secretary of the Interior, declarations of their ownership. Similar declarations concerning Alaskan reindeer acquired by any person not a native of Alaska by purchase or by gift at any time after September 1, 1937, shall be filed as aforesaid within thirty days after the date of such acquisition. Records of all declarations thus filed shall be made and kept open to public inspection in Alaska. If any owner of Alaskan reindeer, to whom the foregoing provisions of this section are applicable, shall fail to file the required declaration within the stated period, he shall be barred thereafter from asserting his claim of title.

§ 500c. Acceptance of gifts

The Secretary of the Interior is hereby authorized to receive, in the name of the United States, for and on behalf of said natives of Alaska, gifts made for the purposes of this subchapter.

§ 500d. Acceptance and expenditure of Federal funds

The Secretary of the Interior is hereby authorized to receive and expend, for the purposes of this subchapter, properly authorized loans, grants, or allocations made to him for said purposes by Federal agencies.

§ 500e. Resolving fund; moneys not to be covered into Treasury

Except as herein otherwise specially provided, none of the moneys collected or received by the Secretary of the

Interior in his administration of this subchapter shall be paid into the Treasury, but all such moneys shall constitute a revolving fund to be administered by the Secretary of the Interior for the purposes of this subchapter.

§ 500f. Management of industry by Secretary; aim of management

The Secretary of the Interior is authorized and directed to organize and manage the reindeer industry or business provided for by this subchapter in such manner as to establish and maintain for said natives of Alaska a complete and self-sustaining economy and to encourage and develop the activity and responsibility of said natives in all branches of said industry or business.

§ 500g. Distribution of reindeer, property, and profits to natives

The Secretary of the Interior is authorized to distribute the reindeer and other property acquired by the United States under this subchapter among the Eskimos or other natives of Alaska, or to corporations, associations, or organizations of said natives, either in the form of gifts or under such conditions as the Secretary of the Interior may prescribe, and to execute and deliver appropriate instruments of title, or to hold and use the same in trust for the use and benefit of said natives, with a view of effecting the widest possible distribution of such reindeer and other property among those natives of Alaska who are in need thereof and who can make proper use of the same: *Provided*, That during the period of the trust, income derived directly from the sale of reindeer and reindeer products as provided in this subchapter shall be exempt from Federal income taxation. The Secretary of the Interior may from time to time, in such manner as he determines to be proper for effectuating the purposes of this subchapter, distribute among those of said natives or

corporations, associations, or other organizations of said natives, who are engaged in said industry or business or for whose subsistence reindeer are necessary, whatever profits may be earned by that part of the industry or business which is owned by the United States and which may, in the judgment of the Secretary of the Interior, be distributed in accordance with sound business practice.

§ 500h. Grant of administrative powers to organizations of natives

The Secretary of the Interior is hereby authorized to grant, in his discretion and subject to such terms as he may impose, to any corporations, associations, or other organizations of said natives any or all of the powers relating to the administration of the reindeer industry or business herein provided for, upon a finding by him as to each grant that it is in the interests of the said natives of Alaska and will serve the purposes of this subchapter.

§ 500i. Alienation of reindeer or interests; penalty

Live reindeer in Alaska, and the increase thereof, acquired by the Secretary of the Interior pursuant to this subchapter, and live reindeer in Alaska, and the increase thereof, owned by the said natives of Alaska or corporations, associations, or other organizations of said natives, however acquired, shall not be sold or transferred, by descent, devise, or in any other manner whatsoever, to anyone other than said natives of Alaska[1] the United States for and on behalf of said natives, or corporations, associations, or other organizations of said natives, except with the consent in writing of the Secretary of the Interior or his duly authorized agent, stating that such consent is given upon the condition that the reindeer,

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[1] So in original. Probably should be a comma.

and any increase thereof, sold or otherwise transferred with said consent, shall either be butchered in the Territory of Alaska within thirty days or shipped out of said Territory and never brought back alive into said Territory. Sales or other transfers of said reindeer, if made without the consent in writing herein required, or, although made with said consent, if followed by failure to comply with the condition therein required, shall be null and void, and shall not pass any title to or right to possession of any reindeer or increase thereof. No stock or other interest in any corporation, association, or other organization of said natives, engaged in or organized for the purposes of engaging in the reindeer industry or business, shall be transferred, by descent, devise, or in any other manner whatsoever, to anyone other than said natives of Alaska, the United States for and on behalf of said natives, or corporations, associations, or other organizations of said natives. Any willful violation of the provisions of this section by any vendee or other transferee shall be punishable by a fine of not more than $500: *Provided*, That no title to any reindeer, or reindeer products, owned by the United States for and on behalf of the said natives of Alaska, nor any title to reindeer, or reindeer products, owned by any of said natives or said corporations, associations, or other organizations of said natives, nor any stock or other interest in said corporations, associations, or other organizations of said natives, shall be transferred by descent, device[2] or in any other manner whatsoever, except pursuant to regulations promulgated by the Secretary of the Interior for the purposes of preserving the native character of the reindeer industry or business in Alaska and effectuating the other purposes of this subchapter: *Provided further*, That nothing herein contained shall prevent any native of Alaska who owns reindeer or any

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[2] So in original. Probably should read "devise".

interest therein through stock ownership, or otherwise, in any corporation or association or other organization owning reindeer, from transferring his reindeer, or any interest therein, to his children or other native relatives by gift, sale, devise, or bequest, or prevent the same from being so transferred or passed by descent.

§ 500j. "Reindeer" defined

"Reindeer" as used in this subchapter shall be understood to include reindeer and such caribou as have been introduced into animal husbandry or have actually joined reindeer herds, and the increase thereof.

§ 500k. Rules and regulations

The Secretary of the Interior is hereby authorized to promulgate such rules and regulations as, in his judgment, are necessary to carry into effect the provisions of this subchapter.

§ 500*l*. Appointment of natives to administer industry

Whenever, in his judgment, it is practicable and to the best interests of the natives the Secretary shall appoint natives to the supervisory and other positions in the administration of such reindeer industry or business.

§ 500m. Use of public lands; violation

In order to coordinate the use of public lands in Alaska for grazing reindeer with the purposes of this subchapter, the Secretary of the Interior is hereby authorized to regulate the grazing of reindeer upon said lands. He may, in his discretion, define reindeer ranges and regulate the use thereof for grazing reindeer; issue grazing permits; regulate and control all round-ups, handlings, markings, and butcherings of reindeer upon said public lands; and may issue rules and regulation to carry into effect the provisions of this section. Any person who willfully violates any of the rules and

regulations promulgated for the purpose of carrying into effect the provisions of this section shall be deemed guilty of a misdemeanor and, upon conviction thereof, shall be punished by imprisonment for not more than one year or by a fine of not more than $500.

§ 500n. "Native of Alaska" defined

The term "natives of Alaska" as used herein shall be deemed to mean the native Indians, Eskimos, and Aleuts of whole or part blood inhabiting Alaska at the time of the Treaty of Cession of Alaska to the United States and their descendants of whole or part blood, together with the Indians and Eskimos who, since the year 1867 and prior to September 1, 1937, have migrated into Alaska from the Dominion of Canada, and their descendants of whole or part blood.

Supreme Court, U.S.
FILED
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No. 97-1280

In the Supreme Court of the United States

OCTOBER TERM, 1997

KAWERAK REINDEER HERDERS ASSOCIATION, INC.,
PETITIONER

v.

THOMAS E. WILLIAMS, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

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13 pp

QUESTION PRESENTED

Whether the Reindeer Industry Act of 1937, 25 U.S.C. 500 *et seq.*, bars a non-Native Alaskan from importing Canadian reindeer into Alaska for private commercial purposes.

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-26a) is reported at 115 F.3d 657. The order of the district court (Pet. App. 27a-32a) is unreported. The opinion of the Interior Board of Indian Appeals (Pet. App. 33a-76a) is reported at 23 I.B.I.A. 28.

JURISDICTION

The judgment of the court of appeals was entered on May 28, 1997. A petition for rehearing was denied on October 9, 1997. Pet. App. 77a-78a. On December 24, 1997, Justice O'Connor extended the time for filing the petition for a writ of certiorari to and including February 6, 1998. The petition was filed on February 5, 1998. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Congress enacted the Reindeer Industry Act of 1937 (RIA), 25 U.S.C. 500 *et seq.*, to provide a "means of subsistence for the Eskimos and other natives of Alaska" by establishing, through federal acquisition and oversight, a "self-sustaining" Native reindeer industry. 25 U.S.C. 500. The United States first introduced Siberian reindeer into Alaska between 1891 and 1902, at the urging of Dr. Sheldon Jackson, the United States' General Agent in Alaska. The federal government took that step to "augment the dwindling source of native food supply consisting of game and fish, which had been seriously depleted by the whites." F. Cohen, *Handbook of Federal Indian Law* 410 (1942). In the decades that followed, non-Native Alaskans increasingly assumed control of reindeer production to the detriment of the Native Alaskan enterprises and economy. Congress enacted the RIA to invigorate and support the Native Alaskan reindeer industry.

The RIA directs the Secretary to acquire reindeer and related equipment "necessary to the effectuation of the purposes of this subchapter" and to manage the reindeer thus acquired in a manner that "maintain[s] for said natives of Alaska a complete and self-sustaining economy." 25 U.S.C. 500a, 500f.[1] The RIA also authorizes the Secretary to promulgate regulations necessary to carry out the Act, including regulations for the use of public lands in Alaska for grazing of reindeer. 25 U.S.C. 500f, 500m.

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[1] Contrary to petitioner's suggestion (Pet. 6), the RIA did not direct the Secretary to acquire all reindeer and reindeer facilities in Alaska.

The RIA also imposes restrictions on the alienation of any government-owned or Native-owned reindeer in Alaska. 25 U.S.C. 500i. The sale or transfer of reindeer to non-Natives is allowed only upon consent of the Secretary and on condition that they "either be butchered in the Territory of Alaska within thirty days or shipped out of said Territory and never brought back alive into said Territory." *Ibid.* In addition, no title to reindeer or reindeer products owned by the United States on behalf of Natives, or by Natives outright, is transferrable except in conformity with regulations promulgated by the Secretary for the purposes of "preserving the native character of the reindeer industry or business in Alaska." *Ibid.* Non-Natives who own reindeer in Alaska are required to file declarations of ownership with an authorized agent of the Secretary or be "barred thereafter from asserting [their] claim of title." 25 U.S.C. 500b.[2]

2. In 1986, private respondent Thomas E. Williams, a non-Native resident of Alaska, requested an opinion from the Juneau Area Director of the Bureau of Indian Affairs on whether the RIA would prohibit his proposed importation of Canadian reindeer into Alaska for private commercial purposes. The Area Director referred the matter to the Regional Solicitor, who concluded that the RIA does not prohibit a non-Native from importing reindeer from outside of Alaska. Pet. App. 39a-40a. The Regional Solicitor

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[2] In 1986, Congress amended Section 500g of the Act in response to *Karmun* v. *Commissioner*, 749 F.2d 567 (9th Cir. 1984), cert. denied, 474 U.S. 819 (1985), to clarify that Native income derived from the sale of trust reindeer or reindeer products is not subject to federal income taxation.

reasoned that the RIA's restrictions on alienation, which apply to government-owned or Native-owned "[l]ive reindeer in Alaska, and the increase thereof," 25 U.S.C. 500i, do not "expressly prohibit prospectively the importation of reindeer from outside the State." Pet. App. 40a-41a. Thereafter, Williams reported to the Area Director that he had imported 19 reindeer from Canada and that they were owned by a corporation named Alaska Reindeer, Inc. *Id.* at 42a.

In 1989, the Area Director asked the Regional Solicitor to reconsider his earlier opinion. Pet. App. 43a. The Regional Solicitor adhered to his prior reasoning that the RIA does not prohibit non-Natives from importing reindeer. *Id.* at 43a-46a. He emphasized that there is "no express provision of the Act which appears to have been violated by Mr. Williams' importation and ownership of Canadian reindeer" and "no particular ambiguity on the face of the statute which would require us to refer to the legislative history as an aid to interpretation on the point in question." *Id.* at 44a-45a. The Regional Solicitor further explained that the Act's purposes "have not been seriously threatened thus far by the allowance of non-Native importation of non-Alaskan reindeer." *Id.* at 45a.

3. Petitioner, an unincorporated association of 17 Native reindeer herders, filed suit in district court challenging the Regional Solicitor's interpretation of the RIA. *Reindeer Herders Ass'n* v. *Ceasar*, No. A91-511CV (D. Alaska filed Oct. 22, 1991). Petitioner ultimately agreed to dismiss that suit and to pursue an administrative appeal before the Interior Board of Indian Appeals (IBIA). Pet. App. 48a. The Area Director entered a decision explicitly adopting and following the Regional Solicitor's opinions. Petitioner

then filed its administrative appeal. The IBIA reversed the Area Director's decision. *Id.* at 33a-76a.

The IBIA stated that the Area Director's decision was not unreasonable because "no provision in the Reindeer Act explicitly prohibits the importation of reindeer into Alaska or explicitly precludes a non-Native from entering the reindeer business, using imported reindeer." Pet. App. 55a. It nevertheless concluded that, under the canons of construction pertaining to Indian legislation, "an interpretation of a statute, even though reasonable, must be rejected if another interpretation is possible, which is more favorable to the Native beneficiaries." *Id.* at 55a-56a. The IBIA ultimately concluded that the "lack of any explicit provision concerning this matter, in the face of the overall purpose expressed in the Act," created an ambiguity that had to be resolved in favor of the Native herders. *Id.* at 71a-72a.

4. Private respondent Williams sought review of the IBIA's decision in the United States District Court for the District of Alaska. The district court upheld the IBIA's ruling. Pet. App. 27a-32a. The court concluded that the IBIA's decision was reasonable and, because it represented the decision of the Secretary of the Interior, was entitled to deference, *id.* at 29a-30a. The court found Williams' constitutional challenges unpersuasive. *Id.* at 30a-31a.

5. The court of appeals reversed the district court's judgment. The court began its analysis, "as did the Regional Solicitor, by noting the Reindeer Act does not by its terms guarantee Alaskan natives a monopoly in the reindeer business." Pet. App. 7a. The court found that the RIA's grant of assistance to Native reindeer enterprises creates substantial competitive obstacles for non-Native reindeer producers.

Id. at 7a-8a. It concluded, however, that "nothing in the Act actually prohibits non-natives from entering the Reindeer business if they can overcome all these obstacles." *Id.* at 8a.

The court of appeals also looked, however, beyond the plain language of the RIA and considered a number of non-textual factors, including the question whether "a court is bound to defer to an agency's interpretation where the interpretation raises difficult constitutional questions." Pet. App. 11a. The court of appeals discussed that issue at some length, expressing concern that the IBIA's construction would raise serious equal protection issues under the Due Process Clause of the Fifth Amendment. *Id.* at 11a-21a. The court ultimately concluded that "[t]he constitutional questions raised by the IBIA's interpretation are grave" and that there is "no reason to unnecessarily resolve them when a less constitutionally troubling construction is readily available." *Id.* at 21a.

Judge Brunetti concurred. Pet. App. 22a-26a. He concluded that, "[b]ecause the plain language of the statute does not support the district court's upholding of the IBIA's interpretation of the statute, it is not necessary to resort to legislative history to determine the propriety of that interpretation or to resolve constitutional questions posed by the same." *Id.* at 22a.

ARGUMENT

Petitioner urges this Court to review this case to decide a series of constitutional questions respecting the RIA and other laws affecting Native Americans. See Pet. i. Those constitutional issues, however, are not presented in this case. The court of appeals

decided a narrow statutory issue: Whether the RIA bars a non-Native Alaskan from importing Canadian reindeer into Alaska for private commercial purposes. The court concluded that it does not. The court's decision has limited importance, and it does not conflict with any decision of this Court or of another court of appeals. This Court's review is accordingly not warranted.

1. The court of appeals examined the text of the RIA and concluded that "nothing in the Act" prohibits non-Native Alaskans from importing Canadian reindeer into Alaska for commercial purposes. Pet. App. 8a. The court determined, however, that it should also consider pertinent canons of statutory construction, including the general principles that a court owes deference to an agency's construction of a statute that it administers, that a court should interpret statutes enacted for the benefit of Native Americans in favor of their interests, and that a court should construe statutes, if possible, to avoid serious constitutional questions. *Id.* at 8a-11a. The court of appeals concluded that the combined application of those principles also supported its ultimate judgment that the RIA does not prohibit non-Native Alaskans from importing Canadian reindeer into Alaska. *Id.* at 21a.

The court of appeals' opinion makes reference to potential constitutional concerns, but its judgment decides only the statutory question of whether the RIA prohibits a non-Native from importing reindeer. The court of appeals did not squarely decide any constitutional issue. There is accordingly no warrant for this Court to review petitioner's proposed issues of constitutional law. As this Court has repeatedly stated, it "reviews judgments, not state-

ments in opinions." *E.g.*, *California* v. *Rooney*, 483 U.S. 307, 311 (1987); *Black* v. *Cutter Labs.*, 351 U.S. 292, 297 (1956); see also *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842 (1984); *Williams* v. *Norris*, 25 U.S. (12 Wheat.) 117, 120 (1827).

2. The questions that petitioner presents for review do not include the specific issue of statutory construction that the court of appeals actually decided. See Pet. i. It is not this Court's usual practice to consider issues other than those that a petitioner actually puts forward for review. See *Yee* v. *City of Escondido*, 503 U.S. 519, 535 (1992) ("we ordinarily do not consider questions outside those presented in the petition for certiorari"); Sup. Ct. R. 14.1(a) ("Only the questions set out in the petition, or fairly included therein, will be considered by the Court."). In any event, the statutory question would not warrant review by this Court.

The court of appeals' ruling decides a novel issue under the RIA that has not been addressed by any other court of appeals. The RIA affects relatively few people in a single State who engage in an industry—reindeer herding—that does not have nationwide significance. The record in this contains no evidence that private respondent's decade-old reindeer enterprise has had any practical impacts on petitioner's operations. Pet. App. 45a-46a. And even if concerns over those practical impacts should arise, the RIA empowers the Secretary of the Interior to take various actions in support of Native reindeer enterprises and thereby mitigate adverse consequences.[3]

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[3] See 25 U.S.C. 500f (authorizing the Secretary to provide managerial support for the Native reindeer industry); 25

This case accordingly does not satisfy any of this Court's usual criteria for review. See Sup. Ct. R. 10.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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APRIL 1998

U.S.C. 500g (authorizing the Secretary to distribute reindeer and other property to Natives).

Supreme Court, U.S.
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No. 97-1280

In The

Supreme Court of the United States

October Term, 1997

KAWERAK REINDEER HERDERS ASSOCIATION,

Petitioner,

vs.

THOMAS E. WILLIAMS, ALASKA REINDEER HERDERS, INC. and REINDEER HERDERS ASSOCIATION, INC.,

-and-

BRUCE BABBITT, SECRETARY OF THE INTERIOR and NILES CESAR, JUNEAU AREA DIRECTOR OF THE BUREAU OF INDIAN AFFAIRS,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF IN OPPOSITION FOR RESPONDENTS THOMAS E. WILLIAMS, ALASKA REINDEER HERDERS, INC. AND REINDEER HERDERS ASSOCIATION, INC.,

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QUESTION PRESENTED

Did the Court of Appeals properly interpret the Reindeer Industry Act of 1937 as not prohibiting those other than natives in Alaska from owning reindeer?

STATEMENT PURSUANT TO RULE 29.6

There are no parent or subsidiary companies of the respondents, Alaska Reindeer, Inc. and Reindeer Herders Association, Inc.

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STATEMENT OF THE CASE

This case concerns an interpretation of the Reindeer Industry Act of 1937, an act which has no counterpart in any other state or federal legislation. The precise question for review is whether the Ninth Circuit properly rejected an interpretation of the Reindeer Act by the Interior Board of Indian Appeals (the "IBIA") that all persons in Alaska who are not natives are totally and perpetually banned from owning reindeer.

The petition, in which the United States has not joined, misstates the questions presented in this case. The question presented is not whether the rational basis standard of review for Indian classifications adopted by this Court in *Morton v. Mancari*, 417 U.S. 535 (1974) continues to apply, because the Ninth Circuit did not hold that it does not. It is not whether application of the *Mancari* standard of equal protection review of Indian classifications is restricted to those addressing "uniquely Indian interests," because the Ninth Circuit did not hold that it is. Similarly, the question here presented is not whether the Reindeer Act, as construed by the IBIA to prohibit non-Natives from competing in the reindeer industry in Alaska, is constitutional, because the Ninth Circuit did not hold that the Reindeer Act is unconstitutional.

Rather, a unanimous panel of the Ninth Circuit held that the IBIA's interpretation of the Reindeer Act, as barring all in Alaska who are not Natives from owning imported reindeer, was wrong. All three members of the panel believed that the IBIA's interpretation was wrong because it was contrary to the plain language of the Act and all three declined to defer to the IBIA's interpretation. App. 1a-26a.

For these reasons, the questions that the Petitioner asks this Court to answer, questions about the application and continuing

validity of *Mancari* and the constitutionality of the Reindeer Act, while undoubtedly interesting and important, are merely hypothetical in the context of this case. In short, the Petitioner, by its own admission, seeks advisory opinions from this Court. It is scarcely necessary to urge this Court not to give them.

REASONS FOR DENYING THE WRIT

I.

THE NINTH CIRCUIT DID NOT DECIDE AN IMPORTANT QUESTION OF FEDERAL LAW THAT MUST BE SETTLED BY THIS COURT.

1. As noted above, the decision of the Ninth Circuit was that the Reindeer Act does not prohibit persons in Alaska who are not Alaska Natives from importing reindeer to Alaska. This is not an important question of federal law. The Reindeer Act by its terms affects only Alaska. The circuit court's decision directly affects only one person in Alaska, Respondent Thomas Williams, and indirectly affects (and only arguably so) only seventeen other Alaskans, the members of Petitioner who manage reindeer herds on a peninsula in the northwestern corner of Alaska. While this question has not been settled by this Court, there is no conceivable reason why it should be.

2. Similarly, the general principles that the Ninth Circuit panel judges employed in their decisions are neither important nor unsettled. For example, the debate between Judges Kozinski and Brunetti, as to whether under *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), deference should be accorded to the IBIA's interpretation, is of no moment, because both reached the conclusion that, whatever the degree of deference, it is insufficient to withstand appellate court scrutiny and reversal.

The only disagreement among the circuit court panel members concerned their reasons for not giving total deference to the IBIA. Judge Brunetti explained in his concurring opinion that *Chevron* does not apply because the intent of Congress on the matter at issue in this case is clear from the "plain language of the Act." App. 26a. On the other hand, Judge Kozinski, writing for the majority, wrote that *Chevron* does apply, but nonetheless declined to defer to the IBIA because the IBIA's interpretation raised "grave constitutional doubts."

The fine question of whether Judge Kozinski or Judge Brunetti employed the correct analysis in deciding not to defer to the IBIA is not a question that has any import beyond the facts of this case. Whether this Court agrees with Judge Brunetti or Judge Kozinski in this case, the jurisprudence with respect to federal court review of agency interpretation of statutes, which has been well developed in recent decisions of this Court, is not apt to be advanced in the least, and the Petitioner does not argue that it would.

3. Equally well settled is the general principle, employed by Judge Kozinski, that statutory interpretations by agencies, even if entitled to deference under *Chevron*, are subject to independent determination by the judiciary where the agency interpretation raises grave constitutional doubts. While Judge Kozinski noted an arguable inconsistency between *DeBartolo Corp. v. Florida Gulf Coast Trades Council*, 485 U.S. 568 (1988) and *Rust v. Sullivan*, 500 U.S. 173 (1991), Judge Kozinski reconciled the inconsistency and applied the principles announced in both. Moreover, the Petitioner does not argue that there is any need for further elucidation by this Court on this question.

4. The Petitioner urges that the issue of *Mancari's* continued vitality following this Court's decision in *Adarand*

Constructors, Inc. v. Pena, 515 U.S. 200 (1995), is a constitutional question of extraordinary importance and should be decided by this Court. Pet. 10. Petitioner may be right that the issue is important. However, that question cannot be decided by this Court, at least for now, because it was not decided by the Ninth Circuit below,[1] and it has not been decided by any court of appeals or state court of last resort in any other case. Until the question has been presented to and decided by a lower court, any pronouncement by this Court on the question would be purely advisory.

It may well be that the debate over *Mancari's* viability has "intensified in the wake of this Court's holdings that full-blown strict scrutiny applies even to so-called 'benign' racial classifications, . . ." Pet. 14-15. However, this debate has thus far occurred only among commentators, as evidenced by the fact that not a single one of the authorities to which Petitioner cites on this point is a court decision. Pet. 14, n.7.

Petitioner may be right that, "[o]nly this Court can settle this extremely important debate." Pet. 15. But Petitioner is wrong that this Court should settle the question by rendering an advisory opinion in this case. However important the question may be, it is neither the case nor the controversy that is presented here.

Petitioner leads with its chin here, courting a ruling from this Court on broad questions of Indian and constitutional law that are not requisite to the relief it seeks. Inexplicably absent from the petition is any argument that the Ninth Circuit was

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1. As Petitioner acknowledges, Judge Kozinski's comment that "*Mancari's* days [may be] numbered," was only a prediction and, therefore, dictum. Thus, even if this Court were to review Judge Kozinski's decision in this case, whatever comment this Court may make about Judge Kozinski's dictum would, itself, be only dictum.

wrong to substitute its judgment for that of the IBIA's or that, having made that substitution, was wrong in its judgment that the Reindeer Act does not bar the importation of reindeer by non-natives. While one can only assume that the Petitioner's interest in the wider questions of Indian and constitutional law are genuine, it is not evident that the Petitioner has any direct stake in the outcome of those constitutional questions. As there are undoubtedly many on both sides of the issue with real and direct stakes in the question of what impact *Adarand* has had on *Mancari*'s formulation of the equal protection standard applicable to the review of Indian legislation, it should be left to those parties to litigate that issue.

5. The Petitioner argues that the Ninth Circuit's "revision of the *Mancari* standard . . . places in constitutional jeopardy much important Indian legislation . . ." Pet. 15. However, the Ninth Circuit did not, as a rule of decision in this case, revise the *Mancari* standard. Rather, the Ninth Circuit expressly avoided deciding the constitutional questions by rejecting the IBIA's interpretation: "We see no reason to unnecessarily resolve them when a less constitutionally troubling construction is readily available." App. 21a.

6. Even if the Ninth Circuit's opinion could be construed as having decided this case by applying *Mancari*, the Ninth Circuit did not revise the *Mancari* standard that special treatment of Indians will be upheld as long as the "special treatment can be tied rationally to the fulfillment of Congress' unique obligation toward the Indians. . ." 417 U.S. at 555. Rather, the Ninth Circuit simply observed that the "tied rationally" requirement means, at the least, that the legislation must relate to "native land, tribal or communal status, or culture." App. 16a. This equation, and the Ninth Circuit's specific application of it to the IBIA's extension of the Reindeer Act, are completely consistent with *Mancari*. As the Ninth Circuit observed:

> Legislation that relates to Indian land, tribal status, self-government or culture passes *Mancari*'s rational relation test because "such regulation is rooted in the unique status of Indians as a 'separate people' with their own political institutions." *United States v. Antelope*, 430 U.S. 641 (1977).

App. 17a. Again, quoting from this Court's decision in *Antelope*, rendered three years after *Mancari*, the Ninth Circuit stated:

> [W]e do read [*Mancari*] as shielding only those statutes that affect uniquely Indian interests. *See, e.g., Antelope*, 430 U.S. at 646 ("Both *Mancari* and *Fisher* [v. *District Court*, 424 U.S. 382 (1976),] involved preferences or disabilities directly promoting Indian interests in self-government, whereas in the present case we are dealing, not with matters of tribal self-regulation, but with federal regulation of criminal *conduct within Indian country implicating Indian interests.*") (emphasis added by Judge Kozinski).

App. 18a. In short, the Ninth Circuit simply observed that it is not possible for legislation that does not affect "uniquely Indian interests" to satisfy the *Mancari* test that the legislation be "tied rationally to the fulfillment of Congress' unique obligation toward the Indians."

The Ninth Circuit then considered the IBIA-created extension of the Reindeer Act to ban all but Alaska native ownership of reindeer in Alaska in the light of the *Mancari* rationally related test. The circuit court first observed that such a ban was akin to the "blanket exemption for Indians from all civil service examinations," which the Court in *Mancari* acknowledged would pose an "obviously more difficult

question," as distinguished from the employment preference at issue in *Mancari*, which only applied to the Bureau of Indian Affairs, "an agency created for the purpose of serving Indians." App. 16a. The court went on to observe that a total ban on non-native participation in an industry that is not uniquely native, and which applied whether the participation occurred "on the Seward Peninsula or in downtown Anchorage," is "unrelated to Congress' unique obligation toward the Indians." App. 16a-17a. This is a correct articulation and application of the *Mancari* rational relation test.

Because the Ninth Circuit, in considering whether the IBIA-created ban on non-native ownership of reindeer would pass the *Mancari* test, did nothing more than correctly articulate and apply that test, the Petitioner's arguments, that the decision below will result in "profound conflict, uncertainty and confusion in the law" (Pet. 17) and in a "proliferat[ion of] an incalculable amount of litigation challenging the numerous acts of Congress that single out Indians and Alaska Natives for different treatment," (Pet. 2-3) are wrong. If anything, the Ninth Circuit has lessened confusion by further elucidating the *Mancari* "tied rationally" test.

In its decision below, the Ninth Circuit expressed its opinion that, of the over two dozen statutes which were cited by the government and amici as singling out Indians for special treatment, "all relate to Indian land, tribal status, self-government, or culture." App. 16a. This is no less true of the Snyder Act of 1921, 25 U.S.C. §§ 13, *et seq.*, which was not included in the government and amici's list, but is emphasized by the Petitioner. Pet. 3, 23. The Ninth Circuit noted that the Snyder Act, which provides welfare benefits to Indians, provides those benefits only to those Indians who live "on or near" reservations. App. 18a.

The Petitioner attempts to create the impression that the Ninth Circuit's conclusion, from its application of the *Mancari*

test to the Reindeer Act, is "impossible to fathom" because, the Petitioner's argument goes, the Reindeer Act clearly affects "uniquely native interests." Pet. 19. However, the Petitioner deliberately confuses the issue. The issue is not whether some or even most of the other provisions of the Reindeer Act, none of which are at issue in this case, affect "uniquely Indian interests." Mr. Williams concedes, for the sake of argument, that those provisions of the Reindeer Act by which Congress condemned every reindeer in Alaska owned by non-natives, gave those reindeer to the natives, and prohibited non-natives from thereafter reacquiring any of those reindeer or their progeny, affect "uniquely Indian interests" and may be related to Congress' unique obligation toward Alaska natives. However, those portions of the Reindeer Act were not disturbed by the opinion of the Ninth Circuit below.

The only provision of the Reindeer Act that is at issue in this case, and the only one struck down by the Ninth Circuit, is the provision, read into the Reindeer Act by the IBIA, that non-natives in Alaska are totally barred from owning imported reindeer. The Ninth Circuit was obviously correct that this narrow provision of the Reindeer Act does not affect "uniquely native interests."

Moreover, while the Reindeer Act as a whole may, at an earlier time, have affected uniquely native interests,[2] that is not the case today. As Judge Kozinski noted,

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2. The Petitioner asserts that,

> during the century that [reindeer herding] has existed it has become an integral component of the socioeconomic and cultural structure of those Native villages in which it takes place,

and that, "the [reindeer] industry was initiated by the government for Alaska. Natives in significant part to compensate them for the loss of other natural resources depleted by non-Native newcomers." Pet. 20.

> the economic and subsistence needs of natives have changed dramatically in the interim — most notably, by passage of the Alaska Native Claims Settlement Act in 1971, which gave natives 4 million acres of land, almost $1 billion, and shares of stock in newly-created native corporations.

App. 20a.

Thus, the reasoning of the IBIA, that the Reindeer Act must be interpreted to prohibit Mr. Williams from owning any reindeer, even imported reindeer, because Congress intended with the Reindeer Act to purchase a "reservation for Alaska natives, consisting of the reindeer industry in Alaska" (App. 67a), is clearly wrong. Even if Congress' intention had been to "reserve the reindeer industry in Alaska" for Alaska natives, Congress has since revoked that and all other reservations in Alaska save one with the passage of ANCSA. *See Alaska v. Native Village of Venetie Tribal Government*, 118 S. Ct. 948, 950 (1998). ("Equally clearly, ANCSA ended federal superintendence over the Tribe's lands by revoking all existing Alaska reservations but one, and by stating that ANCSA's settlement provisions were intended to avoid a "lengthy wardship or trusteeship.") (citations omitted).

II.

THE NINTH CIRCUIT'S DECISION DOES NOT CONFLICT WITH THE DECISION OF ANY OTHER CIRCUIT COURT OR STATE COURT.

The Petitioner invokes Rule 10(a) as a reason for this Court to review this case. Pet. 25-27. However, as in other parts of the petition, the Petitioner misstates the matter. The Ninth Circuit's decision, reversing the IBIA's interpretation of the Reindeer Act as including a provision banning non-native

ownership of imported reindeer, does not conflict with the decision of any other court, state or federal. Indisputably, no other court has ever been confronted with or has ever ruled upon the question.

The Petitioner argues that

> other courts of appeals, as well as the state courts, that have been called upon to the apply the *Mancari* standard of equal protection review, have done so without . . . convert[ing] the standard to a 'uniquely Indian interests' test.

Pet. 25. Even assuming that the Ninth Circuit did revise the *Mancari* test as Petitioner argues, the conflict with the other courts that have applied *Mancari* would not be a real or intolerable conflict. Rather, the conflict would be merely an inconsistency in dicta or general principles.

Moreover, as set out above, the Ninth Circuit did *not* articulate a new test to apply to equal protection challenges of Indian legislation. First, it did not articulate a new test, because in its inquiry of whether the IBIA's interpretation would result in a provision that raised grave, constitutional doubts, the Ninth Circuit correctly applied the existing *Mancari* "rationally tied" test.

Second, the Ninth Circuit did not actually apply the *Mancari* test at all. The court expressly did not decide that a total ban on non-native ownership of imported reindeer in Alaska would fail *Mancari*'s equal protection test. Rather, the court held that, because such ban would "push the constitutional envelope" (App. 13a), it was not required under *Chevron* to uphold the IBIA's interpretation. Being thus freed of the requirement to give deference to the IBIA's interpretation, the

Ninth Circuit substituted its own statutory construction and held that the IBIA's interpretation was wrong.

To put the matter another way, if Congress were tomorrow to enact such a total ban, the decision below does not foreclose any court, including any court in the Ninth Circuit, from applying without revision the rule of *Mancari* and deciding that the total ban is permissible because it is tied rationally to Congress' unique obligations to Alaska natives. Thus, Judge Kozinski's decision cannot be said to conflict with the decision of any other court.

Even less did the Ninth Circuit hold in this case that traditional equal protection analysis, which requires compelling state interest to justify invidious racial discrimination, applies to all legislation affecting Indians and Alaska natives. Rather, Judge Kozinski stated that the "Supreme Court's recent decision in *Adarand* only adds to our constitutional doubts about the IBIA's interpretation of the Reindeer Act." (App. 19a). While Judge Kozinski mused that "*Mancari*'s days [may be] numbered," this musing was not tantamount to a decision that the IBIA-created extension of the Reindeer Act must be subjected to strict scrutiny. To the contrary, his consideration of the logical implications of *Adarand* was made solely to reinforce his point that a total ban on the ownership by non-natives of imported reindeer "pushes the constitutional envelope" and that if Congress meant to enact such a ban, which encroaches so on constitutional boundaries, it must have done so explicitly. (App. 12a-13a).

III.

THE NINTH CIRCUIT'S DECISION IS NOT SIGNIFICANT TO THE AGENCY'S ADMINISTRATION OF THE REINDEER ACT.

As the Ninth Circuit noted in its opinion below, the Area Director for the Bureau of Indian Affairs in Alaska, which is the agency charged with the administration of the Reindeer Act, when first confronted with the issue in this case, determined, through the Regional Solicitor's Office, that the Reindeer Act does *not* bar Respondent Williams from importing reindeer to Alaska. (App. 6a). It was only after the Petitioner appealed this determination to the Secretary of Interior that the IBIA reversed the decision of the Area Director and ruled that such a ban must be implied from the general purposes of the Reindeer Act. (App. 7a).

Thus, the Ninth Circuit's decision, which is the same as the Area Director's original decision, obviously does not present a problem for the Bureau of Indian Affairs in its administration of the Reindeer Act. Underscoring this is the fact that none of the federal respondents, who were the original defendants in the underlying case, have petitioned this Court for review of the Ninth Circuit's decision. This fact is of even broader significance, given that the Solicitor General's Office routinely attempts to apply this Court's own standards in determining whether to petition for review. Robert L. Stern *et al.*, *Supreme Court Practice*, Seventh Edition, p. 164, Bureau of National Affairs, Inc., Washington, D.C.

CONCLUSION

This case has no immediate importance beyond the particular facts and parties involved. Even with the decision of the Ninth Circuit, the seventeen reindeer herders who make up the Petitioner, and the few other Alaska natives who participate in the reindeer industry, still have, in Judge Kozinski's words, their "big leg up in the business" (App. 7a). They still have the Congressional mandate to the Secretary of the Interior to organize and manage a reindeer industry for Alaska natives; they still have the prohibition on any non-native getting into the business by purchasing any native or government-owned existing reindeer stocks; and they still have exclusive grazing privileges on federally owned lands in Alaska.

On the other hand, even if this case were reviewed and reversed, the only impact would be that Respondent Williams, who husbands his reindeer on his privately owned farm located fifty miles from Alaska's largest city, and 500 miles from Petitioner's herds, would have to dispose of his animals. While this would be a devastating result for him, it is of no great moment to anyone else, including the Petitioners.

Finally, no pronouncements by this Court on Indian or constitutional law would be required for reversal, as this case is, at its bottom, a case about the interpretation of a 1937 statute that applies only to Alaska. For reasons Respondent Williams cannot fathom, the Petitioner wishes to convert this case into a springboard to obtain an advisory opinion of this Court as to the effect that *Adarand* has on *Mancari*. The Court should resist the suggestion and reject this petition for a writ of certiorari.

Respectfully submitted,

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1997

KAWERAK REINDEER HERDERS ASSOCIATION,

Petitioner,

v.

THOMAS E. WILLIAMS, ALASKA REINDEER HERDERS, INC., and REINDEER HERDERS ASSOCIATION, INC.,

and

BRUCE BABBITT, Secretary of the Interior, and NILES CESAR, Juneau Area Director of the Bureau of Indian Affairs.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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REPLY BRIEF FOR PETITIONER

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1997

No. 97-1280

KAWERAK REINDEER HERDERS ASSOCIATION,

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v.

THOMAS E. WILLIAMS, ET AL.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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REPLY BRIEF FOR PETITIONER

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1. Respondents, in their desire to avoid plenary review by this Court, have taken the tactic of attempting to minimize the significance of the decision below to an untenable extreme. Thus, both the federal and private respondents insist that the Ninth Circuit panel majority merely engaged in a traditional exercise of statutory construction without deciding *any* constitutional question. Federal Opp. 7 ("The court of appeals' opinion makes reference to potential constitutional concerns, . . . [but] did not squarely decide any constitutional issue"); Williams Opp. 1 (The case does not involve the issue of "whether application of the *Mancari* standard of equal protection review of Indian classifications is restricted to those addressing 'uniquely Indian interests,'

because the Ninth Circuit did not hold that it is"). On the contrary, the panel majority plainly and unequivocally held that application of the *Mancari* constitutional standard of review turns on whether the classification is addressed to "uniquely Indian interests" or "unique Indian concerns," an issue that is answered with a four-part inquiry into whether the classification relates to "Indian land, tribal status, self-government, or culture." Pet. App. 15a-19a. Respondents' proffered reading of the opinion is indefensible.

2. Respondents pursue their strategy of misleading with the straw-man suggestion that petitioner has failed to present for review the real issue in the case, namely, "the specific issue of statutory construction that the court of appeals actually decided." Federal Opp. 8; *see also* Williams Opp. 4-5. But petitioner's quarrel is with the court's treatment of the Constitution, *not* its application of principles of statutory construction. The panel majority squarely held that there was a gap in the statute resulting from its silence with respect to the permissibility of non-Natives importing reindeer from outside the State for commercial purposes, that the Secretary was empowered to fill in that gap, and that his interpretation was "not unreasonable" and hence must be accorded *Chevron* deference. Pet. App. 9a-10a. The statutory-construction issue was thus resolved in petitioner's favor. The majority then proceeded, however, to invoke the doctrine of "constitutional doubt" (*id.* at 11a-14a), *see Almendarez-Torres v. United States*, 118 S. Ct. 1219, 1227-28 (1998); *id.* at 1234 (SCALIA, J., dissenting), and supplant that reasonable construction with one of the court's own making. Pet. App. 15a-21a. It is here—with the majority's interpretation and application of the *Constitution*—that petitioner's complaint arises.

Only by limiting the *Mancari* equal-protection standard of rational-basis review to those statutes that relate to

"uniquely Indian interests" (in conjunction with its expressed doubts as to the continued vitality of the *Mancari* doctrine *vel non*) did the majority enable itself to devise a construction of the statute (and not a plausible one, either, as discussed below) different from the one required by the standard tools of statutory construction. Manifestly, the majority interpreted and applied the Constitution in order to determine that the otherwise-required meaning of the statute raised grave constitutional doubts. And equally clear, if petitioner is right that the opinion below misconstrued and misapplied the *Mancari* doctrine (and that the doctrine retains full vitality), and hence that the constitutional questions are not truly grave and doubtful, a decision from this Court to that effect will restore the Secretary's favorable construction of the Act.[1]

3. Private respondents stress that the Ninth Circuit

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[1] The Solicitor General appears to dispute that the intent of the Act was to eliminate all non-Native ownership of reindeer and related facilities in Alaska (Federal Opp. 2 n.1), while private respondents acknowledge that "Congress condemned every reindeer in Alaska owned by non-Natives." Williams Opp. 8. Private respondents are correct. At the time of passage of the Act, the Secretary had informed Congress that "[n]onnative holdings . . . comprise one-fourth of the reindeer in Alaska," and "that the reindeer industry will not be assured permanently to the natives of Alaska unless all possibility of white ownership be eliminated." Letter of 17 May 1937 from Secretary Ickes to Hon. Lex Green, *reprinted in* H.R. REP. NO. 1188, 75th Cong., 1st Sess. 5 (8 July 1937). Congress gave the Secretary the power he requested. *See also* Brief for the Federal Appellees 29, 9th Cir. No. 95-35607 ("The Reindeer Act reflects Congress's determination that a one-time federal buy-out of all subsequently acquired non-Native reindeer and related equipment was necessary to reverse the deleterious impacts of non-Native ownership and to reserve the reindeer industry to Alaska Natives"); FELIX S. COHEN'S HANDBOOK OF FEDERAL INDIAN LAW 410-11 (1942).

majority did not actually hold that this Court's decisions in *Mancari* and succeeding cases are no longer good law in the wake of *Adarand*. Williams Opp. 1, 3-4. It would be truly remarkable if the lower court had expressly so held, in the teeth of this Court's repeated admonitions that other courts are not free to announce that one of this Court's precedents has been overruled by implication. *See, e.g., Agostini v. Felton*, 117 S. Ct. 1997, 2017 (1997); *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477, 484 (1989). That the court of appeals was not so bold as to exercise authority it did not possess, however, hardly diminishes the fact that, aside from its newly devised test for applying the *Mancari* standard of constitutional review, the court quite clearly and expressly questioned the continued viability of that doctrine. Pet. App. 19a-20a. Nor does that circumstance make the issue any less worthy of this Court's review.

The significance of the panel majority's construction and application of the applicable constitutional principle is underscored by the point that its view has led it to judicially design a statutory scheme that only a deranged Congress would have adopted. Under the statutory program as it will now operate under the ruling below, non-Natives such as respondent Williams will be permitted to import "non-Alaskan reindeer" and enter the commercial reindeer business. Such non-Natives will be accorded a distinct competitive advantage over Alaska Native herders, because non-Natives will be allowed to sell reindeer to other non-Natives for commercial purposes, while the statute (§ 500i) explicitly prohibits Alaska Natives from selling reindeer to non-Natives (except for slaughter or permanent export). Meanwhile, the Secretary, pursuant to the trust responsibility placed upon him by the Act (*see* Federal Opp. 8), will be obliged to monitor the newly created non-Native sector of the industry and buy out or condemn non-Native businesses

whenever he determines (as he inevitably will) that non-Native commercial herds are having an adverse impact on the Native industry. *See* Pet. App. 40a.

The decision below has thus created a non-Native reindeer industry in Alaska (contrary to the undeniable intent of Congress) and, along with it, a guaranteed *government* market for reindeer acquired by non-Natives. This remarkable program, moreover, overtly discriminates against Native herders solely on account of their status as Alaska Natives. This astonishing result is accomplished entirely in the name of avoiding a grave and doubtful constitutional question. This Court should review the Ninth Circuit's understanding and application of the constitutional principle which is the alleged cause of such an absurd statutory regime.

4. Finally, both the federal and private respondents speculate that the consequences of the decision below will not be far-reaching. Federal Opp. 8; Williams Opp. 12-13. The federal respondents provided a sufficient answer to this contention in their brief in the Ninth Circuit, in which they emphasized "[t]he potentially deleterious impact of non-Native commercial reindeer enterprises on the Native reindeer industry":

> Appellants [private respondents] cannot carve themselves out of Congress's scheme on the ground that their particular impact on the Native industry might be *de minimis*. *Cf. Mandeville Island Farms, Inc. v. American Crystal Sugar Co.*, 334 U.S. 219, 236 (1948) (holding preventative regulation proper under the Commerce Clause if individual activity, when multiplied, contains threat to the economy). Congress clearly had in mind the cumulative effects of non-Native

> ownership of reindeer when it enacted the Reindeer Act. As recognized by the IBIA, Congress understood that "herds of a size to threaten the Native industry could well evolve from an initially small number of reindeer." 23 IBIA at 66 n.24. That understanding was evidenced by the acceptance of the Secretary of Interior's amendment to the proposed Act which allowed the Interior Department to purchase escaped and stray reindeer. Absent this provision, the Secretary argued, the situation sought to be "eliminated entirely" would recur. Appellants [private respondents] would have this Court ignore the very circumstances that led to the enactment of the Reindeer Act in the first instance, that is, usurpation of the government-sponsored reindeer industry by non-Natives.

Brief for the Federal Appellees 29-31, 9th Cir. No. 95-35607 (footnote omitted).

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For the foregoing reasons, and those in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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